No. 91-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

vs.

ROBERT MOSBACHER, SECRETARY OF COMMERCE,
Respondent.

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

vs.

RICHARD SMITH, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Does a federal district court have removal jurisdiction pursuant to the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), of an action filed by a lending bank in state court against the Secretary of Commerce to collect on a loan guaranty issued pursuant to the Trade Act of 1974, 19 U.S.C. §§ 2101 *et seq.*, where the Secretary denies liability under the guaranty and raises no federal defense?

In such a case, does the Secretary have a right to a trial by jury in federal court where no statute or constitutional provision confers such a right and where, if removal jurisdiction had been properly predicated on the Tucker Act, 28 U.S.C. § 1346(a)(2), a jury trial would have been expressly prohibited by 28 U.S.C. § 2402?

LIST OF PARTIES

Petitioner before this Court is Union National Bank of Little Rock, a corporation. Petitioner is now known as Union National Bank of Arkansas. Petitioner's parent company is The Union of Arkansas Corporation. Respondents are Robert Mosbacher, Secretary of Commerce; Richard Smith, Trustee in Bankruptcy for Leird Church Mfg. Co., a corporation; and Edward L. Kutait, an individual. During the pendency of this litigation, Richard Smith was removed as Trustee in Bankruptcy for Leird Church Mfg. Co., and was replaced by a successor Trustee, Richard Cox.

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Petitioner Union National Bank of Little Rock respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered May 23, 1991.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 933 F.2d 1140, and is reprinted in the Appendix (A-1). The judgment of the United States District Court for the Eastern District of Arkansas, Western Division, (Howard, J.) is unreported and is reprinted in the Appendix (A-20). The district court's Order denying Petitioner's motion to remand is unreported and is reprinted in the Appendix (A-33).

Jurisdiction

The United States Court of Appeals for the Eighth Circuit entered its judgment on May 23, 1991. The court of appeals denied Petitioner's timely petition for rehearing on July 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes and Court Rules Involved

U.S. Constitution, Amendment 7 —

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be reexamined in any Court of the United States, than according to the rules of common law.

19 U.S.C. § 2350 (Trade Act of 1974) —

> In providing technical and financial assistance under this part the Secretary may sue and be sued in any court of record of a State having general jurisdiction or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; . . .

15 U.S.C. § 634(b)(1) (Small Business Act) —

In the performance of, and with respect to, the functions, powers, and duties vested in him by this Chapter the Administrator may —

(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; . . .

28 U.S.C. § 1331 —

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1346(a)(2) (Tucker Act) —

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

. . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. . . .

28 U.S.C. § 1441(a), (b) —

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which

the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendant sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1442(a)(1) ("Federal Officer Removal" statute) —

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 2402 —

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1)

shall, at the request of either party to such action, be tried by the court with a jury.

Rule 39(c), Federal Rules of Civil Procedure —

. . . (c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

STATEMENT OF THE CASE

In July of 1985 Union National Bank of Little Rock ("Petitioner") filed a complaint against Respondent Malcolm Baldridge, Secretary of the United States Department of Commerce ("the Secretary")[1] in the Circuit Court of Pulaski County, State of Arkansas. The complaint, consisting of two counts, sought to recover $1.5 million on two separate loan guaranty agreements executed by the Economic Development Administration ("EDA") of the Department of Commerce.

Petitioner's complaint alleged that the state court "has jurisdiction pursuant to 19 U.S.C. Section 2350" (A-24). That section, which is contained in the Trade Act of 1974, 19 U.S.C. §§ 2101 *et seq.*, waives sovereign immunity with respect to financial transactions entered into by the EDA under the Trade Act. Section 2350 provides that, with respect to such transactions, the Secretary may "sue and be sued" in federal district court or "in any court of record of a State having general jurisdiction." The Pulaski County Circuit Court was such a state

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[1] Robert Mosbacher was later substituted as the Secretary.

court. Other than the citation of § 2350 to explain why the United States Secretary of Commerce could be sued in state court, the complaint contained no reference to federal law. The claims themselves were predicated solely on breach of contract.

Respondent Secretary removed the case to the United States District Court for the Eastern District of Arkansas. The removal petition, as amended, alleged removal was proper under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). The amended petition also alleged that there was "original jurisdiction in this matter pursuant to 28 U.S.C. 1331" and that the case is one of which the district courts "have original jurisdiction and is thus removable under 28 U.S.C. 1441(a)" (A-30). The amended petition did not by terms allege that Petitioner's claims "arise under" any federal law,[2] did not specify any such federal law, did not specify any federal defense upon which the Secretary relied, made no reference to the Tucker Act, 28 U.S.C. § 1346(a)(2), and failed to specify any basis for original jurisdiction other than the conclusory reference to § 1331.

Contemporaneously with the filing of his amended removal petition, Respondent Secretary also filed his answer to Petitioner's complaint (A-36). Simply denying any liability to Petitioner under the guaranty agreements, the answer raised no affirmative defense of any kind, federal or otherwise. The answer also "denie[d] that Plaintiff [Petitioner] is entitled to a jury trial" (*id.*).

Petitioner filed a timely motion requesting that the case be remanded to state court. The district court denied the motion and sustained removal jurisdiction solely on the basis of the federal

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[2] The Secretary's original removal petition (A-27) alleged that "this is an action against the United States of America pursuant to Section 2350 of Title 19, United States Code." (¶ 2). That allegation does not appear in the Secretary's amended petition (A-30).

officer removal statute, 28 U.S.C. § 1442(a)(1). The court held that § 1442(a)(1) gave the Secretary "an absolute right to removal from State court to federal court" (A-34).

About the time of these proceedings, litigation was also pending between Petitioner and Respondent Leird Church Furniture Manufacturing Company, Inc. ("Leird") and Respondent Edward L. Kutait ("Kutait"), Leird's sole shareholder. Leird and Kutait had brought a so-called "lender liability" case against Petitioner, asserting various tort damage claims arising out of Petitioner's loans to them. Those loans included the two loans the EDA had guaranteed under the agreements with Petitioner. Originally filed in state court, the tort case was removed by Petitioner to the bankruptcy court in December of 1984 after Leird and Kutait filed bankruptcy petitions (in the Eastern District of Arkansas). Petitioner also filed a proof of claim in the bankruptcy case in the amount of $2.4 million for its unpaid loans, to which Respondent Leird filed an objection.

The three proceedings — Petitioner's claims against the Secretary, the tort claims of Leird and Kutait against Petitioner, and Leird's objection to Petitioner's claim in bankruptcy — were transferred back and forth between the district court and bankruptcy court several times. Ultimately, over Petitioner's objections, Petitioner's guaranty case against the Secretary and the Leird/Kutait tort case against Petitioner were consolidated for jury trial in the district court.[3] More specifically, in addition to its objection to federal removal jurisdiction in the guaranty case, Petitioner objected to the consolidation of the two cases on the ground of prejudice (*see* Memorandum, 2/12/88, p. 9; Order, 5/12/89; Trial Tr. 1242), and further objected that the Secretary was not entitled to a jury trial in federal court (*see* Motion, 9/24/

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[3] Leird's objection to Petitioner's proof of claim was sent back to the bankruptcy court, where it still pends.

87; Order, 4/7/89).[4] In a final effort to avoid a consolidated jury trial where all three Respondents would be its adversaries, Petitioner filed a motion for leave to voluntarily dismiss its guaranty case against the Secretary without prejudice pursuant to F. R. Civ. P. Rule 41(a)(2) (*see* Motion to Dismiss, 11/16/89). The Secretary opposed dismissal and the district court denied Petitioner's motion (Order, 12/8/89).

The consolidated case was tried to a jury for fourteen days from January 23 to February 9, 1990. Leird and Kutait as plaintiffs in the tort case, and the Secretary as defendant in the guaranty case, jointly presented their case in chief during the first twelve days of trial. The three Respondents collaborated fully in the calling and examination of witnesses, in the presentation of other evidence, in their cross examinations of Petitioner's witnesses, in their opening statements and closing arguments to the jury, and in all other aspects of the trial.

Respondent Secretary put on various witnesses who testified and opined at length that Petitioner had committed numerous technical breaches of the loan guaranty agreements, that those breaches were material to the EDA, and that they justified termination of the EDA's guaranty obligations under the provisions of the guaranty agreements (*see generally* Tr. 279ff., 1458ff., 2180ff., 3201ff. & 3363ff.; *see also* Tr. 726, 758 & 1242). That extensive testimony was not relevant to the tort claims and prejudiced Petitioner's defense of those claims. Some of the Secretary's evidence was inflammatory and extremely prejudicial to Petitioner in the tort case. For example, one EDA witness was permitted to testify, to show the EDA's

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[4] Initially taking the position that the guaranty case against him was not triable to a jury (A-36), the Secretary eventually combined forces and sided with Leird and Kutait, who wanted a jury trial. Reversing his position, the Secretary joined Leird and Kutait in seeking a consolidated trial to a jury.

"state of mind" and notwithstanding Petitioner's objections, that the EDA at one point became convinced that Petitioner's conduct with respect to Leird gave rise to lender liability under the "landmark" *Farah* case[5] (Tr. 1502-3, 1505 & 1524-28). The witness testified that the EDA believed at the time that Ed Kutait should sue Petitioner because he had a good claim for lender liability (*id.*). The witness expounded on the *Farah* case and testified that the jury in *Farah* awarded $18 million in damages in favor of the borrower against its bank (*id.*). As to the Leird/Kutait tort case — which asserted "lender liability" claims in the mold of *Farah* — this testimony is a classic example of incompetent, inflammatory, egregiously prejudicial evidence calculated solely to invade the province of the jury on the ultimate issues in the case. Such evidence would have never been admissible in the tort case if tried separately.

Overruling Petitioner's motions for directed verdicts, the trial court submitted both cases to the jury. The jury awarded actual and punitive damages totalling $5.76 million against Petitioner in the tort case, and found against Petitioner on its claims against the Secretary for breach of the guaranty agreements. The district court denied Petitioner's timely motions for JNOV. Petitioner timely appealed to the United States Court of Appeals for the Eighth Circuit, invoking appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner argued on appeal that the assertion of removal jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), was directly contrary to this Court's decision in *Mesa v. California*, 489 U.S. 121 (1989). *Mesa* unequivocally held that removal under this statute "must be predicated on the allegation of a colorable federal defense." 489 U.S. at 129. Given that the Secretary raised no federal defense, Petitioner

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[5] *State National Bank of El Paso v. Farah Manufacturing Co.*, 678 S.W.2d 661 (Tex. App. 1984).

contended, *Mesa* clearly precluded officer removal jurisdiction in this case. Petitioner further argued, in addition to numerous points not pertinent here, that Respondent Secretary had no right to a jury trial (Appellant's Br. at 48-49); Reply Br. at 23-24) and that consolidation of the two cases for trial was prejudicial error (Appellant's Br. at 43-45 & 49-50; Reply Br. at 21 & 24-25).

As to removal, the Secretary contended that this Court's decision in *Mesa*, fairly read, did not require averment of a federal defense (Br. at 25). Moreover, he contended, the guaranty agreements were "federal contracts," and Petitioner's claims were "based on federal law," namely, 19 U.S.C. § 2350 (of the Trade Act), and the case was accordingly removable under 28 U.S.C. § 1441(b) (Br. at viii, 17 & 19-21). As to jury trial, the Secretary claimed he had a constitutional right to a jury trial under the Seventh Amendment and that, alternatively, Petitioner had consented to or waived its objection to a jury trial (Br. at 40-47). Both the Secretary (Br. at 25-40) and the Leird and Kutait Respondents (Br. at 43-45) argued that the consolidation was proper and that, in any event, it was not reversible error.

The Eighth Circuit affirmed all aspects of the judgments of the district court as to both the guaranty case and the tort case, with one exception. It remanded to the district court solely for the purpose of determining whether the punitive awards in the tort case (which totalled $4.5 million) violated Petitioner's rights of constitutional due process in light of this Court's recent decision in *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991).[6] The Eighth Circuit's opinion specifically noted Petitioner's contentions challenging removal jurisdiction, the Secretary's right to a jury trial, and the propriety of consolidation of the cases for trial, but summarily rejected them as "without merit" (A-18). Petitioner timely filed a petition for rehearing by the Eighth Circuit panel, which was denied on July 8, 1991.

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[6]That issue is currently pending in the district court on remand.

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the contours of federal court jurisdiction, and the continuing viability of the conditions attached to the United States' waiver of sovereign immunity in the Tucker Act, in suits for breach of contracts to which the Government is a party pursuant to nationwide federal programs. Maintenance of the proper limits of federal jurisdiction, particularly in the exercise of federal removal jurisdiction, which necessarily divests state-court jurisdiction and defeats the plaintiff's choice of forum, is a matter of paramount concern. In the context of actions for breach of contracts to which the Government is a party, this concern has an added dimension. In such cases, special attention and precise analysis should be devoted to the determination whether to recognize any ground for subject matter jurisdiction *other than* the Tucker Act, because to do so will nullify the no-jury-trial requirement that conditions the Tucker Act's waiver of sovereign immunity. *See* 28 U.S.C. § 1346(a)(2) & § 2402.

This case graphically demonstrates the consequences stemming from a loose and improper recognition of alternative jurisdictional grounds that fails to give deference to the carefully delineated scheme of the Tucker Act. The case provides an appropriate vehicle for this Court to clarify the sources and boundaries of federal jurisdiction and the availability of jury trials in an increasingly important class of cases involving claims for breach of government contracts.

I.

The Decision of the Court of Appeals Sustaining Removal Jurisdiction Over Petitioner's Guaranty Case Against the Secretary Conflicts With This Court's Decision in *Mesa v. California*

The Eighth Circuit's affirmance of the district court's holding that the federal officer removal statute gave the Secretary "an absolute right to remove," where he raised no federal defense, conflicts with this Court's decision in *Mesa v. California*, 489 U.S. 121 (1989). Reviewing the Court's prior decisions construing 28 U.S.C. § 1442(a)(1) and its predecessors, *Mesa* concluded that

> an unbroken line of this Court's decisions extending back nearly a century and a quarter have understood all the various incarnations of the federal officer removal statute to require the averment of a federal defense.

Id. at 133-4. After then considering and rejecting the Government's various arguments why the requirement should be eliminated, *Mesa* unequivocally held that

> Federal officer removal under 28 U.S.C. § 1442(a) *must be predicated upon averment of a federal defense.*

Id. at 139 (emphasis added). Justice Brennan (joined by Justice Marshall), concurring, expressed the view that it was "not . . . inconceivable" that Congress intended to permit one exception to the "federal defense" requirement, namely, where, unlike in *Mesa*, the federal officer can show "widespread resistance by state and local governmental authorities" to federal law and that he "is [being] prosecuted because of local hostility to his function." *Id.* at 140 (Brennan, J., concurring).

Aside from this one possible exception based on "local hostility" — which has no bearing on the case at bar — "a unanimous

Court" in *Mesa* (*id.* at 122) held that the averment of a federal defense is an otherwise *absolute* requirement that "must" be met to support federal officer removal jurisdiction. By sustaining the district court's removal jurisdiction in this case, the Eighth Circuit erroneously failed to enforce that hard-and-fast requirement, and its decision conflicts with *Mesa*.

The Secretary's contention that removal should be permitted in the absence of a federal defense as long as plaintiff's claim is sufficiently "federal" in character simply cannot be squared with *Mesa*. As noted, *Mesa*'s requirement of a federal defense is absolute and admits of no exception (other than, possibly, for "local hostility"). Moreover, the *Mesa* opinion also explicitly considered and rejected an identical argument made by the Government in that case. *See* 489 U.S. at 129-30.[7] And in *International Primate Protection League v. Administrators of Tulane Educational Fund*, ___ U.S. ___, 111 S. Ct. 1700, 1705

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[7] In *Mesa* the Government argued that *Cleveland, Columbus C. & I. R. Co. v. McClung*, 119 U.S. 454 (1886) stood for the proposition that "a federal defense is not a prerequisite to removal," because in that case the plaintiff's claims arose under federal law and federal officer removal was permitted under the predecessor of § 1442(a)(1). *Mesa*, 489 U.S. at 129. Rejecting the contention, this Court acknowledged that plaintiff's claims in *McClung* arose under federal law, but denied that that was the basis of federal officer removal jurisdiction:

> Apart from the fact that the [plaintiff] itself could have brought suit in federal court based on 'arising under' jurisdiction, the [federal officer's] *defense* was clearly based on the [federal statute in question].

Id. at 129-30 (emphasis added). Removal was upheld in *McClung*, the *Mesa* opinion emphasizes, not because plaintiff's claims arose under the federal statute in question, but because the federal officer's own reliance on the statute was "defensive and . . . based in federal law." *Id.* at 130.

n.4 (1991), which involved removal of a civil case,[8] the Court recently reiterated that the "basis for removal jurisdiction under § 1442(a)(1) is the federal officer's substantive *defense* that 'arises under' federal law" (emphasis added). Here, the Secretary raised no such defense and the district court therefore plainly lacked federal officer removal jurisdiction.

The Secretary's contention that removal jurisdiction is alternatively sustainable based on "arising under" jurisdiction does not withstand analysis. In the first place, the Secretary's removal petition, as amended, nowhere alleged or identified any federal law under which Petitioner's claims ostensibly arose. Such pleading defects are jurisdictionally fatal in the removal context. *See Mesa*, 489 U.S. at 131; *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S.146 (1914); 1A *Moore's Federal Practice* ¶0.168[3.-4] at 561-62 ("[I]t is essential that the proper allegation of grounds be set forth according to the terms of the statute. It is not enough that a valid basis for removal exists. The ground(s) must be set out in the notice, and the notice should not leave any issue, as to the prima facie right to remove, at large.") (citing authorities).

In any event, Petitioner's guaranty claims did not "arise under" federal law. That the guaranty agreements may be "federal contracts" and that "federal common law" may provide governing rules for interpretation or otherwise[9] does not, without more, create original "arising under" jurisdiction in an action for

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[8] The Secretary also argued below that *Mesa*'s "federal defense" requirement is limited to state criminal prosecutions against a federal officer, and does not apply to state-court civil cases brought against them. Such a limitation is unsupportable, as is attested to by *International Primate Protection* and various earlier decisions of the Court discussed in *Mesa*.

[9] *Cf. United States v. Krieger*, 1991 WL 143443 n.1 (S.D.N.Y. 1991) ("Since there is no substantive body of federal law on the essential elements and burdens of proof in a claim arising out of [an EDA] guaranty contract, the court looks to the law of [the State]").

their breach. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 16, 24 n.26 & 26-7 (1983); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) (contract action did not "arise under" federal law even though federal law must be interpreted in order to construe a provision in the contract that was a condition to the contract's enforceability). Petitioner's claims were based solely upon the contracts themselves and the facts concerning the parties' performance thereunder. Federal law was not the source of Petitioner's claims against the Secretary, nor did it resolve any "substantial question" upon which Petitioner's "right to relief necessarily depend[ed]." *Franchise Tax Board*, 463 U.S. at 27-28.

The Secretary's contention that Petitioner's claims "arise under" § 2350 of the Trade Act is equally unavailing. That section deals with the Secretary's standing to sue and be sued, waiver of sovereign immunity, and jurisdictional issues. Section 2350 does not create the underlying causes of action it addresses. Such procedural or jurisdictional statutes are not deemed to be the source of a plaintiff's cause of action for "arising under" purposes. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 216 (1983) (the "substantive right must be found in some other source of law"). In this case it was the contracts, not § 2350, that provided the substantive source of Petitioner's cause of action.

The district court and the Eighth Circuit sustained removal jurisdiction in this case without any proper articulated basis for doing so. The injury suffered by plaintiffs in such cases "is clear, for they have lost the right to sue in [their State] court — the forum of their choice." *International Primate Protection*, ___ U.S. ___, 111 S. Ct. at 1704. And in this particular instance, but for the improper exercise of removal jurisdiction Petitioner would not have had to face the consolidated trial that prejudiced its defense in the tort case. More broadly, as this Court has stressed, "Congress has narrowed the opportunities for entrance into the federal courts" out of a desire not to "unduly swell the

volume of litigation in the District Courts" and for salutary reasons of federal-state comity. *Skelly Oil*, 339 U.S. at 673. "To be observant of these restrictions is not to indulge in formalism or sterile technicality." *Id.*

Important as these considerations may be, the crucial reason why this Court should grant review of Petitioner's first question presented is that, in contract actions like this against the Government, the improper recognition of non-Tucker Act bases of subject matter jurisdiction erodes the scheme of that Act. More particularly, it threatenens the viability of the restrictions conditioning the waiver of sovereign immunity in the Tucker Act, as explained more fully in the next point.

II.

The Availability of a Jury Trial in Federal Court In a Contract Action Against the Secretary to Collect on an EDA Loan Guaranty Is an Important Unsettled Question Necessarily Affecting the Nature and Extent of the Government's Waiver of Sovereign Immunity in the Tucker Act, With Ramifications for Actions on Other Types of Government Contracts

The Tucker Act grants original jurisdiction to the district courts, concurrent with the Claims Court, of contract damage actions against the Government "not exceeding $10,000 in amount." 28 U.S.C. § 1346(a)(2). However, 19 U.S.C. § 2350 provides that, with respect to actions (like the case at bar) on Government contracts entered into pursuant to the Trade Act, the district courts have jurisdiction "without regard to the amount in controversy."[10] Section 2350 thus removes the Tucker Act's

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[10] Section 634 of the Small Business Act, 15 U.S.C. §§ 631 *et seq.*, contains language identical to § 2350 of the Trade Act. The analysis set forth herein therefore applies with equal force to actions on Government contracts entered into pursuant to the Small Business Act

$10,000 ceiling for district court jurisdiction.[11] *See Citizens Marine National Bank v. U. S. Department of Commerce*, 854 F.2d 223 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). Suits on EDA guaranty agreements are therefore cognizable in district courts irrespective of the amount claimed.

Title 28 U.S.C. § 2402 provides that any action against the Government under § 1346(a)(2) of the Tucker Act "shall be tried by the court without a jury." Rule 39(c) of the Federal Rules of Civil Procedure further provides that in actions against the Government where "a statute of the United States provides for trial without a jury," jury trials are forbidden even "with the consent of both parties." This strict prohibition against jury trials in Tucker Act cases is a condition attached to the United States' waiver of its historical sovereign immunity under the common law,[12] and therefore does not run afoul of the Seventh Amendment's guarantee of the right to trial by jury. *Galloway v. United States*, 319 U.S. 372, 388 (1943).

The determination whether jury trials are permissible in suits against the Government for breach of contracts entered into pursuant to the Trade Act (or pursuant to the Small Business Act, *see* n.10) therefore critically depends upon the precise source of the district court's subject matter jurisdiction. If jurisdiction is predicated solely on the Tucker Act, jury trials are clearly proscribed by 28 U.S.C. § 2402 and Rule 39(c). This underscores the importance of determining whether, as urged by the

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[11] Title 28 U.S.C. § 1491 separately grants jurisdiction to the Claims Court without any jurisdictional ceiling.

[12] Another condition attached to the Tucker Act's waiver of sovereign immunity is that only damages, and not declaratory or injunctive relief, may be sought against the Government. *See Glidden v. Zdanok*, 370 U.S. 530 (1962); *United States v. King*, 395 U.S. 1 (1969).

Secretary and as discussed in point I above, non-Tucker Act jurisdictional grounds exist pursuant to the federal officer removal statute, based on "arising under" jurisdiction with respect to a federal common law of contracts, or based on "arising under" jurisdiction with respect to § 2350 of the Trade Act.[13]

Even if such alternative jurisdictional grounds might otherwise exist, the question next arises as to whether the "exclusivity" of Tucker Act jurisdiction bars their assertion. The issue, as put by the Court of Appeals for the District of Columbia Circuit, is whether

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[13] An issue also exists as to whether § 2350 of the Trade Act, and the identically worded § 634 of the Small Business Act, are direct grants of "original" district court jurisdiction or whether, instead, they simply remove the $10,000 jurisdictional ceiling contained in the *Tucker Act*'s grant of original jurisdiction. *Cf. Citizens Marine National Bank, supra.* The language of these provisions is not entirely clear. It provides that "jurisdiction is conferred . . . without regard to the amount in controversy." Notably, it does not provide that "jurisdiction is *hereby* conferred." The absence of the word "hereby" supports the view that it is the Tucker Act which provides the grant of original jurisdiction, and that § 2350 merely removes the Tucker Act's $10,000 jurisdictional ceiling. Also supporting this view is the fact that the words "without regard to the amount in controversy" would be superfluous if § 2350 were construed to be itself a grant of original jurisdiction. Statutory language granting jurisdiction without mention of any jurisdictional amount is automatically "without regard to the amount in controversy," without having to say so. *Compare* 28 U.S.C. § 1331 (which contains no language at all regarding amount in controversy for "arising under" jurisdiction) *with* 28 U.S.C. § 1332 (which expressly imposes the $50,000 minimum amount-in-controversy requirement for diversity jurisdiction). Furthermore, § 2350's statement that "jurisdiction is conferred" may fairly be read only to waive and undo sovereign immunity's *jurisdictional bar* that would otherwise exist (*see United States v. Mitchell*, 463 U.S. 206, 212 (1983) [such a waiver is a "prerequisite for jurisdiction"]), rather than as a grant of original jurisdiction in the first instance. The unsettled status of § 2350 as a grant of original jurisdiction, *cf. Citizens Marine National Bank, supra*, is a matter that should be also resolved by this Court.

> a plaintiff whose claims against the United States are essentially contractual should not be allowed to avoid the jurisdictional (and hence remedial) restrictions of the Tucker Act by casting its pleadings in terms that would enable a district court to exercise jurisdiction under a separate statute and enlarged waivers of sovereign immunity. . . .

Megapulse, Inc. v. Lewis, 672 F.2d 959, 967 (D.C. Cir. 1982). *Megapulse* held that Tucker Act jurisdiction is exclusive and bars the assertion of other jurisdictional grounds. *Accord, American Science & Engineering, Inc. v. Califano*, 571 F.2d 58, 62 (1st Cir. 1978). Other Circuits, including the Eighth, have rejected this view, holding that Tucker Act jurisdiction is not exclusive. *See, e.g., Munoz v. Small Business Administration*, 644 F.2d 1361, 1364-65 (9th Cir. 1981); *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 181-82 & n.14 (8th Cir. 1978). "[T]he state of the law is not entirely clear" with respect to the exclusivity of Tucker Act jurisdiction. *Pacificorp. v. Federal Energy Regulatory Commission*, 795 F.2d 816, 826 (9th Cir. 1986) (concurring opinion); *see also Amoco Production Co. v. Hodel*, 815 F.2d 352, 358 (5th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (noting the split in the circuits).

Justice Stevens, writing for the majority in *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988), observed that "it is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000" but "[t]hat assumption is not based on any language in the Tucker Act." Justice Scalia, dissenting, joined by Chief Justice Rehnquist and Justice Kennedy noted "the 'murky' area of Tucker Act jurisprudence," 487 U.S. at 916 (*quoting Amoco Production, supra*). *Bowen*, which treated other issues, highlights the need for clarification of the Tucker Act issues presented by this Petition.

Even if, the Tucker Act notwithstanding, alternative jurisdictional bases may properly be sustainable in a contract action

against the Government, further unsettled issues still remain as to whether jury trials are permissible. Section 2402 of Title 28, even though technically not applicable under this hypothesis, nonetheless stands as a clear manifestation of Congressional intent that jury trials not be permitted in contract actions against the Government. At a minimum, a comparably clear expression to the contrary — that jury trials are *permissible* — should be required if jurisdictional grounds in derogation of the Tucker Act scheme are to be recognized. The Secretary has been unable to cite any statute or case affording the right to a jury trial in a case such as this. His contention that the Seventh Amendment of the Bill of Rights — which establishes and protects the rights and liberties of individuals against the encroachment of governmental authority — affords the *Government* such a right, is certainly unsettled if not *unsettling*.

The question whether the federal district courts should permit jury trials in contract actions against the Government is a multifaceted issue of exceptional importance that should be addressed and settled by this Court.

CONCLUSION

The Court should grant the writ to resolve the important question whether, in an action against the Government for breach of a contract entered into pursuant to a federal program, only the Tucker Act — not the federal officer removal statute or § 1331 "arising under" jurisdiction — provides the basis for subject matter jurisdiction. If the Tucker Act is the sole source of jurisdiction, jury trials are prohibited in such cases by virtue of 28 U.S.C. § 2402 (and the removal in this case was also improper). If the Court were to sustain the Secretary's urged alternative jurisdictional grounds, then further important unresolved questions remain, which should be reviewed and settled by this Court, as to whether jury trials should nonetheless still be prohibited in such cases. Review is appropriate because this case presents significant issues pertaining to the boundaries of federal court jurisdiction and the nature and extent of the Tucker Act's waiver of sovereign immunity which are likely to recur under the Trade Act and Small Business Act programs.[14]

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[14] In the event the writ is granted, Petitioner will request that the judgment below with respect to Petitioner's guaranty claims against the Secretary be reversed, with appropriate directions. Petitioner would further request that the judgment below with respect to the Leird/Kutait tort claims be reversed and/or remanded with directions to the Eighth Circuit to give further consideration to Petitioner's contention regarding trial consolidation in light of the Court's reversal as to the Secretary's case.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 90-1854

Union National Bank of Little Rock,
Appellant,

v.

Robert Mosbacher, Secretary of the U. S. Department of Commerce,
Appellee.

Richard Smith, Trustee in Bankruptcy for Leird Church Furniture Mfg. Co., Inc., and Edward L. Kutait,
Appellees,

v.

Union National Bank of Little Rock,
Appellant.

Appeal from the United States District Court
for the Eastern District of Arkansas.

Submitted: November 14, 1990
Filed: May 23, 1991

Before McMILLIAN and BEAM, Circuit Judges, and ROSENBAUM,* District Judge.

BEAM, Circuit Judge.

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* The HONORABLE JAMES M. ROSENBAUM, United States District Judge for the District of Minnesota, sitting by designation.

Union National Bank of Little Rock appeals from the district court's denial of its motion for judgment notwithstanding the verdict following a lengthy jury trial. The adverse verdicts stem from Union's action against the United States Secretary of Commerce to enforce the Secretary's guarantee on loans made by Union, and from actions brought against Union by Leird Church Furniture Manufacturing Company and Edward Kutait, Leird's sole shareholder. The Leird-Kutait complaint alleged fraud and breach of fiduciary duty.

The actions arise from mutual participation in a recovery plan, designed to resurrect Leird, pursuant to which the Secretary guaranteed loans Union made to Leird. In essence, Leird, Kutait, and the Secretary argue that Union misapplied the guaranteed loan proceeds by using them primarily to pay itself on Leird's prior indebtedness rather than for the benefit of Leird. The jury found for Leird and Kutait on their claims and awarded actual and punitive damages of $5,760,000. In addition, the jury found that the Secretary, due either to Union's misrepresentations or to its failure to comply with the terms of the loan agreements and guarantee, was not obligated on its guarantee. Union argues that Leird and Kutait did not prove fraud or breach of fiduciary duty, that lost profits cannot be recovered in a fraud action, and that Leird and Kutait failed to present a submissible case of either actual or punitive damages. Union does not appeal the merits of the judgment in favor of the Secretary. Except for our reservations about the constitutionality of punitive damages in this case, we think that the verdicts are well supported by the evidence. Accordingly, we affirm in part and remand in part.

I. BACKGROUND

Plaintiff Leird Church Furniture Manufacturing Company started business in the early 1930's as Leird Lumber Yard. Not until 1939 did Leird become Leird Manufacturing Company, specializing in the manufacture of solid oak pews and other church

furniture. Eventually, Leird's position in the church furniture market became unique; of thirty-some competitors, Leird was the sole company to produce only solid-wood furniture. Leird's annual sales placed it among the top dozen church furniture makers. At its peak, in 1975, sales reached $1,409,752, and Leird employed 112 people. Plaintiff Edward Kutait began his career with Leird in 1960 as a salesman. Several witnesses at trial characterized Kutait as a tremendous salesman, who, indeed, was successful enough to purchase Leird in 1970. Kutait was Leird's sole shareholder, and he ran the company as president until its bankruptcy in 1984.

Following Kutait's purchase of Leird in 1970, the company's sales doubled in the first year. Sales were $1,070,759 in 1973; $1,083,810 in 1974; and $1,409,752 in 1975. These peak years were due in part to sales made to the Church of Jesus Christ of Latter Day Saints. At Kutait's urging, the Mormon Church centralized its purchasing in Salt Lake City in the early 1970's and Leird became its sole supplier, with annual sales reaching $1,000,000. The Mormon account also created problems for Leird, however, for Leird's outdated factory in Little Rock at full capacity was unable to satisfy the production demands of the Mormon Church contracts. As Kutait put it: "We just had more business than we could produce."

In an effort to expand and increase production, Kutait, in February 1974, purchased the Oxford Church Manufacturing Company in Oxford, Nebraska. Kutait hoped that the Oxford plant could satisfy all orders destined for the western United States. At the same time, Leird planned to build a new factory in Little Rock. These efforts together were too much for Leird to accommodate. Kutait had trouble finding skilled woodworkers in Oxford and difficulty managing two plants. Due to its inability to meet production demands and maintain quality, Kutait closed the Oxford plant in November 1976. Meanwhile, the new Little Rock plant, scheduled to open in the winter of

1977-78, suffered numerous construction delays and problems. Start-up was difficult, and, even though the plant was out of production for several weeks that winter and construction overruns were depleting Leird's cash flow, Kutait paid all Leird employees during the shut-down. These problems were exacerbated by the loss of the Mormon account to a Canadian manufacturer in 1976. Partly in reliance on the Mormon account, Leird's once-strong sales force had declined to a fraction of its former size. Thus, sales fell to $1,250,892 in 1976 and further to $1,158,049 in 1977. Declining sales and debt incurred from construction of the new plant led to losses of $38,543 in 1977 and $214,833 in 1978. Leird never climbed out of this hole.

Financing for the new plant in Little Rock had been arranged with First American Bank, but, in 1978, Kutait refinanced these loans with Union National Bank through an initial loan of $450,000. From the beginning, Kutait and Leird dealt with Don Denton, a commercial loan officer and senior vice-president at Union. By 1980, Leird's indebtedness to Union had grown to about $600,000, and Kutait began to look for some way out. In late 1979, he became aware of the Secretary's program, administered through the Economic Development Administration (EDA), to guarantee loans for businesses hurt by foreign competition. Henry Troell at EDA testified that he first heard of Leird in February 1980 through a letter from Denton. Leird's initial inquiries were met with a summary rejection in March 1980, due to EDA's concern that Union sought merely to substitute the government's exposure for its own. Leird and Union persisted, however, and through the efforts of a consultant developed a recovery plan designed to help Leird. Under the recovery plan, which provided for $1,000,000 in working capital loans, Kutait would resign as president and concentrate on rebuilding the sales force.

No one disputes that Leird was in serious financial trouble in early 1980. Indeed, the recovery proposal, dated July 1, 1980,

notes that Leird was on course to liquidation within a few months. Given these dire straits and its perception that Union still sought relief from its own exposure on Leird's indebtedness, EDA again rejected Leird's proposals. Negotiations continued, however, and in June 1980, Union introduced Roger Morin, a friend of Denton's who had done some liquidation work for Union, to Leird. Union told Kutait that Morin was a well-qualified turn-around consultant who could help Leird. When Kutait objected to Morin's help, partly because of his initial, personal dislike of Morin, who was widely characterized at trial as abusive and profane, Union told Kutait that he must either accept Morin or face liquidation, which would include calling a $300,000 personal guarantee given by Kutait's brother, Kemal Kutait. Thus, at a meeting with EDA officials on October 17, 1980, at which Leird and Union offered a further-amended recovery plan, Union presented Morin to EDA as a turn-around consultant already at Leird.

EDA was impressed by Union's commitment, which, together with Union's agreement to subordinate its security on existing loans to Leird, convinced EDA that it should fund the recovery plan. The plan, calling for a $1,000,000 working capital loan and a $600,000 fixed asset loan, was approved on March 9, 1981. Loan documents were signed on April 27, 1981, and Union made its first disbursements to Leird on April 28.

Under the approved plan, Leird was effectively controlled by Union through Denton and Morin. The amended plan—unknown to Kutait when it was presented to EDA—required Kutait to put his stock in an irrevocable voting trust, with Union to act as trustee. Moreover, under the amended plan, Kutait had no authority or responsibilities at Leird. The loan agreement expressly provided that Kutait would serve as chairman of the board for advisory purposes only, would have no direct management authority, and could not maintain offices at Leird. Union advised Kutait, who objected to these provisions, that they were

required by EDA and that Kutait should accept them to close the agreement. Union promised that it would seek changes later. Thus, by these maneuvers, Morin became acting president of Leird, responsible, according to the recovery plan, to the trustee and to the board of directors, made up of Ed and Kemal Kutait, Morin, and Jim Fowler, who was Kutait's attorney. The trustee, Michael O'Brien, testified, however, that he did virtually nothing as trustee for Leird, and the Kutaits and Fowler resigned from the board of directors in December 1981 and were apparently not replaced. For all practical purposes, Union operated Leird with a free hand from April 1981 to May 1982.

Leird did not prosper under Union's control. Union spent the entire $1,000,000 working capital loan and over $100,000 of the fixed asset loan, yet sales for fiscal year 1981 declined to $755,149 (down from $1,047,921 in 1980) and Leird lost $206,431. Following the expenditure of the entire working capital loan and inquiries from EDA about compliance with the recovery plan, Union invited Kutait to return to Leird in May 1982. There, he found no employees in the office, no hourly workers in the plant, no ongoing production, no discernable sales force and only one pending order. Leird struggled on until June 1984, when it filed for bankruptcy. Charging that Union violated its trust by ignoring the terms of the recovery plan and by misapplying funds for its own benefit, Leird and Kutait brought this action.

Leird and Kutait's claims, consolidated with Union's case against the Secretary to enforce the guarantee, were tried to a jury from January 23 to February 9, 1990. The jury was instructed that it could find for Leird and Kutait on theories of fraud and breach of fiduciary duty and that it could find for the Secretary if Union made misrepresentations in its application or failed to comply with the terms of the guarantee and loan agreements. The jury found in favor of Leird, Kutait and the Secretary. It awarded Leird actual damages of $1,100,000 and punitive dam-

ages of $3,000,000. Kutait was awarded actual damages of $160,000 and punitive damages of $1,500,000. Union appeals.

II. DISCUSSION

The district court denied Union's motion for judgment notwithstanding the verdict, finding that there was substantial evidence from which the jury could have found that Union made false and fraudulent misrepresentations to Leird, Kutait and EDA, that Morin and Denton breached a fiduciary duty to Leird and that substantial evidence supported the awards of both actual and punitive damages. While Union frames most of its arguments on appeal in terms of submissibility and focuses primarily on damages, we begin with its argument that Leird cannot recover lost profits--characterized by Union as benefit of the bargain (expectation) damages—in a fraud case based on promissory misrepresentation. The jury was instructed that if it found for Leird on the fraud claim, it could award "the value of any profits lost by the company or reasonably certain to be lost in the future." Trial Transcript at 3965. Union relies on the law of Missouri, *see Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443-44 (Mo. 1988) (en banc), and of Maryland, *see Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 630 (4th Cir.) (applying Maryland law), *cert. denied*, 434 U.S. 923 (1977), to support its argument that benefit of the bargain damages, including lost profits, cannot be recovered in a promissory-misrepresentation case in Arkansas.

To the contrary, in *Cockrum v. Pattillo*, 246 Ark. 594, 439 S.W.2d 632, 640 (1969), the Arkansas Supreme Court held that "[w]e do not agree . . . that this court is committed to the 'out of pocket' measure of damages in fraud cases." Rather, the court held that it had expressly "recognized the so-called 'benefit of the bargain' rule of damages in fraud cases." *Id.* at 641. *See also Thudium v. Dickson*, 218 Ark. 1, 235 S.W.2d 53, 58 (1950) (measure of damages in fraud action arising from failure to supply adequate water as promised under lease same as in breach

of contract action--difference between what land produced and what it would have produced if promise kept). *See generally* H. Brill, *Arkansas Law of Damages* § 35-7, at 490-91 (2d ed. 1990).

Given these cases, Union's argument seems to rest on a distinction between fraud cases based on misrepresentation of an existing fact and those based on a false promise made with the knowledge that it would not be kept. To the extent that Union implies that promissory misrepresentation is not actionable in fraud, *see* brief for appellant at 27, the cases clearly hold otherwise. *See Delta School of Commerce v. Wood*, 298 Ark. 195, 766 S.W.2d 424, 426 (1989) ("[A]n expression of opinion which is false and known to be false at the time it is made is actionable."); *Anthony v. First Nat'l Bank*, 244 Ark. 1015, 431 S.W.2d 267, 274 (1968) (action in fraud for "a false promise [made] knowing at the time it would not be kept"); *Victor Broadcasting Co. v. Mahurin*, 236 Ark. 196, 365 S.W.2d 265, 269 (1963) (" '[W]here one makes a false promise, knowing at the time that it will not be kept, the person injured thereby may have relief in action for fraud.' " (quoting *Coleman v. Volentine*, 211 Ark. 594, 201 S.W.2d 592, 594 (1947))). To the extent that Union argues merely that damages in these cases should be limited to out-of-pocket expenses, it neither cites any Arkansas authority nor gives any persuasive reasons why this should be so. Again, we think that the cases hold otherwise. *See Thudium*, 235 S.W.2d at 58.

As indicated, Union argues primarily that Leird and Kutait failed to present a submissible case of damages. We begin with Union's argument that Leird could not recover lost profits because of Leird's recent loss history. Put another way, Union argues that lost profits in this case were speculative. Indeed, Arkansas law is clear that lost profits must be proved with reasonable certainty. "[P]laintiff must present a reasonably complete set of figures and not leave the jury to speculate." *Ishie v. Kelley*, 302 Ark. 112, 788 S.W.2d 225, 226 (1990) (citation

omitted). *Accord Jim Halsey Co. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898, 903 (1985); *Robertson v. Ceola*, 255 Ark. 703, 501 S.W.2d 764, 766 (1973); *First Serv. Corp. v. Schumacher*, 16 Ark. App. 282, 702 S.W.2d 412, 414 (1985). What must be certain, however, is not a precise calculation of lost profits, but whether profits would have been made. *See Jim Halsey Co.*, 683 S.W.2d at 903 (citation omitted) ("If it is reasonably certain that profits would have resulted had the contract been carried out, then the complaining party is entitled to recover."); *American Fidelity Fire Ins. Co. v. Kennedy Bros. Constr.*, 282 Ark. 545, 670 S.W.2d 798, 799 (1984) ("Lost profits must be proven by evidence which makes it reasonably certain the profits would have been made."). Our review of the record convinces us that Leird met this burden.

We must first note, however, that whether we review a submissibility question under a state or federal standard has not been decided. *International Art Galleries v. Kinder-Harris, Inc.*, 907 F.2d 864, 866 n.2 (8th Cir. 1990). When the standards are the same, we have simply avoided deciding which standard applies. *Crues v. KFC Corp.*, 729 F.2d 1145, 1148 n.1 (8th Cir. 1984). As we indicated in *International Art Galleries*, 907 F.2d at 866 n.2, the Arkansas standard on submissibility questions does not differ from the federal standard. Under Arkansas law, we must consider the evidence in the light most favorable to the appellee and affirm if substantial evidence supports the jury's verdict. *Rogers v. Allis-Chalmers Credit Corp.*, 679 F.2d 138, 142 (8th Cir. 1982) (Arkansas law); *American Fidelity Fire Ins.*, 670 S.W.2d at 800. We do the same under federal law. *See Patchell v. Red Apple Enters.*, 921 F.2d 157, 158 (8th Cir. 1990); *Kim v. Ingersoll Rand Co.*, 921 F.2d 197, 198 (8th Cir. 1990).

Viewing the evidence in the light most favorable to Leird, we think that the jury heard substantial evidence from which it could have concluded that Leird would have again made profits had the recovery plan been carried out. The research of Keith Barry

provided Leird's principal calculations of lost profits. Barry produced two different sets of figures projecting sales and net income from 1982 to 1990. *See* Leird Ex. 330. Assuming that Leird produced annually 150,000 linear feet of furniture by April 30, 1986, Barry calculated that sales would be $1,641,990 in 1982, $2,156,400 in 1983, $2,779,700 in 1984, and $3,465,800 in 1985. Barry testified that he arrived at his sales figures by starting from 1980 sales of $1,047,921, trial transcript at 1878-80, and calculating a steady increase each year to reach 150,000 linear feet in 1986. *Id.* at 3019-20. Sales figures were then calculated as price per linear foot multiplied by the number of linear feet. Using these figures, Barry projected that Leird could make a profit of $158,400 in 1986 on $4,217,850 in sales, and a profit of $434,280 in 1990 on $5,220,333 in sales. Leird Ex. 330. Barry considered his figures conservative and reasonable, trial transcript at 3022, and the jury heard evidence that Leird was capable of such production. *Id.* at 3046 (110,000 linear feet in 1975 at old plant); *id* at 1670 (capacity of new plant was 1,500 to 1,800 linear feet per day).

The initial question, then, was whether the sales figures were realistic. To prove that they were, Barry corroborated his figures several different ways, three of which we mention. Barry calculated Leird's sales as a percentage of the total church furniture market. His figures established that during Leird's peak year in 1975, its market share was 1.3%. Trial Transcript at 3025. By comparison, under the conservative set of figures, Leird's market share would be 1 to 1.5%; under the other figures, 1 to 2%. *Id.* Barry also calculated market share by standard industrial classification codes. By these figures, Leird's market share in 1975 was 3.74%; Barry's projections required a market share in 1983 of 4.46%. *Id.* at 3030. Thus, Barry testified that "I'm not assuming a significant penetration of the market by Leird Church, I am assuming a slight increase in its market share." *Id.* at 3031-32. In addition, Barry calculated sales per salesman. In 1975, production of 110,000 linear feet by sixteen

salesmen meant 6,875 linear feet per salesman. *Id.* at 3026. Barry testified that the same number of linear feet per salesman under the recovery plan would produce sales in excess of his calculations. *Id.* The recovery plan proposed using working capital and a more careful marketing strategy to increase Leird's sales force to twenty-eight. *Id.* The jury knew from the recovery plan in evidence that Leird had employed twenty sales people in 1970, but that the sales force had declined to only six in 1977. *See* Leird Ex. 1. Given the recovery plan's attention to developing the sales force, the jury could conclude that Barry's figures were, as he testified, reasonable. *See* Trial Transcript at 3026.

Following Barry, Lyle Rupert testified about his calculations of net income. Rupert started from Barry's sales figures and reviewed Leird's financial statements and statistics from competitors to arrive at the income figures contained in Leird exhibit 330. From Rupert's calculations, Leird claimed that failure to properly implement the recovery plan, in present value, resulted in lost profits of roughly $4,500,000 to $7,500,000. *Id.* at 3101; Leird Ex. 330.

The jury could have weighed and evaluated these figures in light of substantial evidence that the recovery plan could have worked. The jury could have considered Leird's long history and established reputation in the market, its peculiar niche procured by selling only solid-oak furniture, and testimony that Leird's principal problems were a lack of working capital and poor management—two problems which the recovery plan redressed. The jury could consider testimony that Kutait was an outstanding salesman whose talents would be better used selling furniture than running the company. Indeed, following Kutait's return to Leird in 1982, Leird regained some of the business lost from the Mormon Church. Trial Transcript at 1867-68; Leird Ex. 176. Finally, the jury could consider that EDA independently concluded that the recovery plan was feasible. Henry Troell of EDA testified: "[I]t seemed reasonable that they could increase sales

if they had adequate working capital. They had the capacity to produce the furniture, assuming the recovery plan was placed into effect, and the production problems were solved. . . . We were convinced that Mr. Kutait could sell, and we thought they could generate enough sales to repay the loan." Trial Transcript at 2164-65. In short, the record contains evidence that Leird's problem under Kutait was not a lack of orders, but a lack of capital needed to fill them.

Against this evidence, Union offered its own expert, Charles Venus, who testified that he thought that the projected sales figures were without basis and unrealistic, that Leird's real problem was poor-quality furniture and a bad reputation, and that his own projections showed a negative cash flow and no net income. Under our standard of review, Venus's testimony merely presents a jury question. Accordingly, we hold that Leird presented a submissible case of actual damages.

Similarly, the evidence is clear that Leird and Kutait presented a submissible case of punitive damages. Under Arkansas law, punitive damages may be awarded when the evidence indicates that " 'the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice might be inferred.' " *James v. Bill C. Harris Constr. Co.*, 297 Ark. 435, 763 S.W.2d 640, 642 (1989) (quoting *Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450, 452 (1983)). *Accord National By-Products v. Searcy House Moving Co.*, 292 Ark. 491, 731 S.W.2d 194, 195 (1987). More particularly, to show implied malice, "it must appear that the acting party either knew or had reason to believe that his action was about to inflict injury and that in spite of this knowledge he continued his course of conduct with a conscious indifference to the consequences." *James*, 763 S.W.2d at 642. The Arkansas Supreme Court has made clear that conscious indifference does not entail a deliberate intent to injure. " 'It is not necessary to prove that the defendant deliberately intended to injure the plaintiff. It is

enough if it is shown that, indifferent to consequences, the defendant intentionally acted in such a way that the natural and probable consequence of his act was injury to the plaintiff.' " *National By-Products*, 731 S.W.2d at 195-96 (quoting *Ellis v. Ferguson*, 238 Ark. 776, 385 S.W.2d 154, 155 (1964)). The jury was properly instructed in accordance with these cases. *See* Trial Transcript at 3966; Arkansas Model Jury Instructions (Civil) AMI 2217 (3d ed. 1989).

Union argues, however, that, as in *Dews v. Halliburton Indus.*, 288 Ark. 532, 708 S.W.2d 67, 72 (1986), Leird and Kutait produced no more than "[a] bare allegation of fraud which results in monetary loss" not justifying punitive damages. Our review of the evidence convinces us that Leird and Kutait presented substantial evidence from which the jury could conclude that the natural and probable result of Union's acts was injury to both Leird and Kutait, and yet Union persisted in its conduct, indifferent to the consequences. In short, Union carried out the recovery plan without regard for success, and, therefore, without regard for whether its conduct would injure Leird and Kutait.

Union represented to EDA, Leird, and Kutait, for instance, that Morin was a turn-around consultant who could help Leird. *See, e.g.*, Trial Transcript at 2145. But the jury also heard evidence from which it could conclude that Union never intended to use the recovery plan to help Leird. In a letter from Denton to his superiors at Union dated June 11, 1980, Denton wrote: "[W]e might, of course, be able to realize more through careful liquidation of the assets. I have retained Roger Morin to assist in supervising the situation." Leird Ex. 11; trial transcript at 437. Morin testified that he considered himself to be a caretaker. Trial Transcript at 931. Similarly, the jury could find that Union's claim that Morin would remain at Leird only temporarily was knowingly false. Morin remained at Leird as acting president for over one year, as Union's representative for two years. When the board of directors through Kutait actually

hired a permanent president, Harold Braswell, to replace Morin (as the recovery plan called for, and as Denton encouraged), Denton told Braswell that "Roger Morin was there to stay, that he was the bank's man, and he was there to stay." *Id.* at 963. Morin told Braswell that Leird could be sold and that he should not buy a house in Little Rock. *Id.* at 965. And in a letter to Denton dated August 7, 1981, Morin stated: "At your request, I have not actively sought any further candidates for the position of President." Union Ex. 122; trial transcript at 446. Finally, Morin left Leird only after the entire working capital loan had been disbursed. Trial Transcript at 2320-21. The jury could reasonably have concluded that Union never intended that Morin's tenure at Leird would be only temporary.

Just as Union failed to replace Morin with a permanent president, so did Union fail to properly employ the trustee. While Morin acknowledged that he worked for the trustee, *id.* at 506, the trustee, O'Brien, testified that he never gave any directions to Morin and did not expect that Morin would report to him. *Id.* at 2964, 2975. He made no daily decisions for Leird, did not approve any expenses, and never handled any funds. *Id.* at 2961, 2971, 2975. Indeed, O'Brien testified that he did not even know of the recovery plan. *Id.* at 2964.

The jury also could have found that Union paid no regard to the consequences of its actions by the way it spent the working capital loan. One witness testified that of $1,000,000 in working capital funds, $672,000 was used for non-income producing assets. *Id.* at 3217. For example, Union directed that $250,000 be placed in an interest-bearing account at the bank. While the account paid 9 or 9.5% interest, Leird was paying 14.5% interest on the loan; Union thus earned $37,366.77 at Leird's expense. *Id.* at 344, 370. Of the first working-capital disbursement, Union made substantial principal and interest payments to itself. *Id.* at 307-08. Through Leird, Union also paid Morin $10,000 per month as salary, *id.* at 357, even though the loan agreements

capped the president's annual salary at $50,000, and EDA twice declined to waive that restriction. Trial Transcript 2187, 2188; Leird Ex. 118. Moreover, Union did not comply with the terms of the loan agreements requiring that all disbursement requests be made in writing. Instead, Denton himself prepared back-dated requests and had them typed at the bank (not even on Leird letterhead) for Morin's signature. Trial Transcript at 324-27. Several witnesses testified that Union did not comply with the terms of the guarantee or the loan agreements. *See, e.g., id.* at 3218-19; 3371-75.

By this pattern of disbursements, of which we have cited only a few examples, despite $1,000,000 in capital funds spent by Leird in fiscal 1982, capital assets actually decreased by $250,000. *Id.* at 3305-06. Put in other terms, one witness testified that through its use of the working capital funds, Union reduced its own exposure on Leird's indebtedness by $691,537.81, or by 92%. *Id.* at 365-66. As another put it, "[I]t is almost as if the lifeblood of the company was being drained from its veins. *Id.* at 3218. We think that from this sort of evidence the jury could conclude that Union did not make a serious attempt to implement the recovery plan with Leird's well-being in mind. Indeed, the jury could conclude that Union acted solely in its own interests, without regard for injury it might cause to Leird and Kutait. Accordingly, Leird and Kutait presented a submissible case of punitive damages.

Finally, however, we are troubled by Union's argument that the award of punitive damages in this case violates due process.[1]

---

[1] Union has not argued on appeal that the award of punitive damages is excessive, and, at oral argument, Union stated that it did not make a motion for a remittitur or new trial to the district court. Instead, Union argued in its motion for judgment notwithstanding the verdict only that there was no evidence from which the jury could find that Union acted with malice, and, thus, that Leird and Kutait did not make a submissible case of punitive dam-

(Footnote 1 continued on next page)

Since this case was submitted, the Supreme Court has decided *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), in which it considered whether an award of punitive damages under Alabama law violated the defendant's due process rights. The Court held that it could not say "that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional." *Haslip*, 111 S. Ct. at 1043. Nevertheless, the Court declined to say that the award of punitive damages is never unconstitutional. *Id.* Thus, the Court considered the award under Alabama law.

In finding no constitutional violation, the Supreme Court considered the following factors significant: (1) the jury was instructed that the purpose of punitive damages was to punish the defendant and to deter similar conduct so that its discretion was not unlimited; (2) the Alabama Supreme Court has established post-trial procedures for scrutinizing punitive awards, enumerating certain factors for the trial court to consider in reviewing a verdict for excessiveness; (3) the Alabama Supreme Court also reviews an award by applying "detailed substantive standards" to ensure that the award is reasonable in amount and rational in light of its purpose. *Id.* at 1044-45. The Supreme Court concluded that "[t]he application of these standards . . . imposes a sufficiently definite and meaningful constraint on the discre-

---

(Footnote 1 Continued)

ages. In addition, Union's motion contains one sentence, that "the punitive damage awards deprived Union of its rights under the due process clause of the United States Constitution." On appeal, Union renews its submissibility arguments, and slightly expands its due process argument. Since Union did not raise the issue of excessiveness below and does not raise it here, we do not address it. *See Total Petroleum v. Davis*, 788 F.2d 476, 483 (8th Cir. 1986).

tion of Alabama fact finders in awarding punitive damages." *Id.* at 1045.[2]

Although Arkansas Supreme Court reviews punitive damage awards to determine whether the award shocks the conscience of the court or is so great that it must be the product of passion or prejudice, *see, e.g., O'Neal Ford v. Davie*, 299 Ark. 45, 770 S.W.2d 656, 659 (1989); *First Commercial Bank v. Kremer*, 292 Ark. 82, 728 S.W.2d 172, 177 (1987), the Arkansas Supreme Court has also noted that "[c]onsiderable discretion is given to the jury in fixing punitive damages in an amount it deems appropriate to the circumstances." *Walt Bennett Ford v. Keck*, 298 Ark. 424, 768 S.W.2d 28, 31 (1989). Thus, Arkansas juries are apparently told little more than defendant's net worth and that punitive damages serve to punish and to deter. *See, e.g., Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453, 458 (1983). For our cursory review, we are not certain that Arkansas law provides standards which impose "a sufficiently definite and meaningful constraint on the discretion" of the jury. *See Haslip*, 111 S. Ct. at 1045. Because *Haslip* was decided after submission of this case, however, we think that careful consideration of the due process argument would best be furthered by remanding this case to the district court. *Cf. Robertson Oil Co. v. Phillips Petroleum Co.*, No. 90-1451, slip op. at 10 (8th Cir. April 18, 1991).

---

[2] Just prior to *Haslip*, we applied a similar analysis to conclude that an award of punitive damages under South Dakota law did not violate due process. *See Davis v. Merrill Lynch, Pierce, Fenner & Smith*, 906 F.2d 1206, 1226-29 (8th Cir. 1990). In *Davis*, we noted that South Dakota juries must consider five specific factors in awarding punitive damages, and that the award is subject to review in both the trial court and the state supreme court. Both courts independently apply the same factors on review. *Id.* at 1227. Thus, we found that South Dakota juries were not given standardless discretion. *Id.* at 1227-28.

III. CONCLUSION

Union does not challenge the merits of the verdict in favor of the Secretary. Brief for Appellant at 6 n.6. Rather, it argues that the district court lacked removal jurisdiction, that the Secretary was not entitled to a jury trial, and that its case against the Secretary should not have been consolidated with Leird and Kutait's claims. We have carefully considered these arguments, as well as Union's other arguments on appeal, and find them to be without merit. Accordingly, the judgment of the district court is affirmed in part. We remand the case, however, solely for the district court to determine whether, in light of *Haslip*, the award of punitive damages in this case violated Union's due process rights under the United States Constitution.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

No. 90-1854EA

Union National Bank of Little Rock,
Appellant,

v.

Robert Mosbacher, Secretary
of the U.S. Department of Commerce,
Appellee.

****

Richard Smith, Trustee in Bankruptcy for Leird Church
Furniture Mfg. Co., Inc. and Edward L. Kutait,
Appellees,

v.

Union National Bank of Little Rock,
Appellant.

Appeal from the United States District Court
for the Eastern District of Arkansas

Appellant's petition for rehearing has been considered by the court and is denied.

July 8, 1991

ORDER ENTERED AT THE DIRECTION OF THE COURT

/s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. LR-C-85-605

UNION NATIONAL BANK OF LITTLE ROCK
PLAINTIFF

VS.

ROBERT MOSBACHER,
Secretary of United States Department of Commerce
DEFENDANT

NO. LR-C-88-55
(Consolidated with: LR-C-85-605)

LEIRD CHURCH FURNITURE MANUFACTURING COMPANY, INC. AND EDWARD L. KUTAIT
PLAINTIFF

VS.

UNION NATIONAL BANK OF LITTLE ROCK
DEFENDANT

FILED: FEB. 13, 1990

JUDGMENT

On the 23rd of January, 1990, this cause came on to be heard, Plaintiffs, Leird Church Manufacturing Company, Inc., and Edward Kutait, appearing in person and by their attorneys Randel K. Miller, Peter Heister and Greg Hopkins and the defendant, Union National Bank, appearing in person and by its attorneys, Stan Rauls and Griffin Smith and The Secretary of Commerce, appearing in person and by his attorneys, George Maden and Fred Kopatich.

All parties announcing they were prepared for trial, a jury composed of twelve members of the regular panel of petit jurors of this court was selected, impaneled and sworn according to law to try the issues of fact arising in this case.

After hearing all of the evidence introduced, the instructions of the court and the arguments of counsel, the jury retired on February 9, 1990 to consider its verdict, and after deliberating thereon returned the following verdicts:

"We the jury find for Leird Church Furniture Manufacturing Company, Inc. on its claim against Union National Bank of Little Rock and award Leird Church compensatory damages in the amount of $1,100,000.00.

John P. May,
Foreperson
2/9/90"

"We the jury find for Leird Church Furniture Manufacturing Company, Inc. on its claim against Union National Bank of Little Rock for punitive damages and award Leird Church punitive damages in the amount of $3,000,000.00.

John P. May,
Foreperson
2/9/90"

"We the jury find for Edward L. Kutait on his claim against Union National Bank of Little Rock and award Edward L. Kutait compensatory damages in the amount of $160,000.00.

John P. May,
Foreperson
2/9/90"

"We the jury find for Edward L. Kutait on his claim against Union National Bank of Little Rock for punitive damages and

award Edward L. Kutait punitive damages in the amount of $1,500,000.00.

John P. May,
Foreperson
2/9/90"

"We the jury find for Robert Mosbacher, Secretary of the United States Department of Commerce on the claim filed by Union National Bank of Little Rock.

John P. May,
Foreperson
2/9/90"

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that:

1. Plaintiff Leird Church Manufacturing Company, have and recover of and from Defendant Union National Bank the sum of $1,100,000.00 compensatory damages and $3,000,000.00 punitive damages, together with all of its costs herein expended, with interest thereon from this date at the maximum rate provided by law, for all of which execution may issue;

2. Plaintiff Edward Kutait, have and recover of and from Defendant Union National Bank the sum of $160,000.00 compensatory damages and $1,500,000.00 punitive damages, together with all of its costs herein expended, with interest thereon from this date at the maximum rate provided by law, for all of which execution may issue;

3. Union National Bank take nothing on its complaint against the Secretary of Commerce and judgment is entered for the Secretary.

IT IS SO ORDERED this 13 day of February, 1990.

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

APPROVED:

EICHENBAUM, SCOTT, MILLER,
LILES & HEISTER, P.A.
Suite 1400 Union National Plaza
124 W. Capitol Avenue
Little Rock, Arkansas 72201
(501) 376-4531
ATTORNEYS FOR LEIRD CHURCH
FURNITURE MANUFACTURING COMPANY,
INC.
and EDWARD L. KUTAIT

By: /s/ Randel K. Miller
ARK. BAR NO. 83127

RKM390

APPENDIX D

CIRCUIT COURT
PULASKI COUNTY, ARKANSAS

UNION NATIONAL BANK OF LITTLE ROCK
PLAINTIFF

vs.

MALCOLM BALDRIGE, SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE
DEFENDANT

COMPLAINT

Union National Bank of Little Rock states:

1. This court has jurisdiction pursuant to 19 U.S.C. Section 2350.

2. Defendant, as Secretary of the U. S. Department of Commerce, is liable for the undertakings of the Economic Development Administration of the United States of America.

3. All conditions precedent to filing this suit have been performed or have occurred.

4. It demands a jury trial on both of the following counts.

COUNT I

5. On March 19, 1981 plaintiff and the Economic Development Administration (hereinafter "EDA") entered into the attached Guaranty Agreement (Exhibit A) in which EDA agreed to pay on demand 90% of the total principal and interest due on a loan evidenced by the attached promissory note (Exhibit B) in the event of default.

6. The note is past due and unpaid despite demand.

7. The principal balance due on the note is $1,000,000.00 and the accumulated interest to July 25, 1985 is $472,785.23. Interest accrues at the daily rate of $390.41.

8. Despite demand, defendant has refused to pay plaintiff 90% of the total principal and interest due on the note which amounts to $1,325,506.70 as of July 25, 1985.

COUNT II

9. On March 19, 1981 plaintiff and EDA entered into the attached Guaranty Agreement (Exhibit C) in which EDA agreed to pay on demand 90% of the total principal and interest due on a loan evidenced by the attached promissory note (Exhibit D) in the event of default.

10. The note is past due and unpaid despite demand.

11. The principal balance due on the note is $171,945.70 and the accumulated interest to July 25, 1985 is $87,500.46. Interest accrues at the daily rate of $67.12.

12. Despite demand, defendant has refused to pay plaintiff 90% of the total principal and interest due on the note which amounts to $233,501.54 as of July 25, 1985.

13. AFFIDAVIT FOR COUNTS I AND II:

STATE OF ARKANSAS
COUNTY OF PULASKI

W. R. NIXON, JR., ATTORNEY FOR PLAINTIFF, STATES UNDER OATH THAT HE VERILY BELIEVES THAT THERE IS NO GOOD AND VALID DEFENSE TO THIS ACTION UPON THE MERITS, AND THAT IF DEFENSE IS MADE IT WILL BE FOR THE PURPOSE OF DELAY, MERELY.

/s/ W. R. NIXON, JR.

SUBSCRIBED AND SWORN TO BEFORE ME, A NOTARY PUBLIC, DULY QUALIFIED AND ACTING IN AND FOR SAID COUNTY AND STATE, ON THIS 25TH DAY OF JULY, 1985.

/s/ Marian H. Green
NOTARY PUBLIC
MY COMMISSION EXPIRES
JULY 8, 1989
(SEAL)

Wherefore, plaintiff prays for judgment against defendant in the sum of $1,559,008.24 plus interest, attorney fees, costs and all proper relief.

UNION NATIONAL BANK
OF LITTLE ROCK

By: /s/ W. R. NIXON, JR., P.A. for
Smith, Smith & Duke, its attorneys
1955 Union National Plaza
Little Rock, AR 72201

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. LR-C-85-605

UNION NATIONAL BANK OF LITTLE ROCK

v.

MALCOLM BALDRIDGE, Secretary of the
United States Department of Commerce

PETITION FOR REMOVAL FROM STATE COURT

Your petitioner, the United States of America, acting by and through the United States Attorney for the Eastern District of Arkansas respectfully shows:

1. That this action was commenced and is pending in the Circuit Court of Pulaski County, Arkansas, as Cause No. 85-6894, as an action to obtain a judgment on a Guaranty Agreement entered into by the United States of America, by and through the Economic Development Administration.

2. That this is an action against the United States of America pursuant to Section 2350 of Title 19, United States Code, and is thus removable under Sections 1441(b), United States Code. No bond is required herein as set forth in 28 United States Code, Section 1446(b).

3. A copy of plaintiff's Complaint and summons which were served upon the United States Attorney on July 29, 1985, being all the pleadings, process or orders served upon petitioner are attached hereto and filed herewith.

WHEREFORE, your petitioner prays that this action be removed from the above-described Court to the United States

District Court for the Eastern District of Arkansas, Western Division.

GEORGE W. PROCTOR
United States Attorney

/s/ CHALK S. MITCHELL
Assistant U. S. Attorney
P. O. Box 1229
Little Rock, AR 72203
501-378-5342

VERIFICATION

STATE OF ARKANSAS)
)ss:
COUNTY OF PULASKI)

I, Chalk S. Mitchell, having been duly sworn on oath state that I am an Assistant United States Attorney for the Eastern District of Arkansas, and that the averments of the foregoing petition are true, correct and complete to the best of my knowledge and belief.

GEORGE W. PROCTOR
United States Attorney

/s/ CHALK S. MITCHELL
Assistant U. S. Attorney
P. O. Box 1229
Little Rock, AR 72203
501-378-5342

Subscribed and sworn to before me this 23rd day of August, 1985.

/s/ Linda Carter
Notary Public

My Commission Expires:
2-6-93

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. LR-C-85-605

UNION NATIONAL BANK OF LITTLE ROCK,
PLAINTIFF,

VS.

MALCOLM BALDRIDGE, Secretary of the
United States Department of Commerce,
DEFENDANT.

AMENDED PETITION FOR REMOVAL FROM STATE COURT

Comes now the Defendant, Malcolm Baldridge, Secretary of the United States Department of Commerce, by and through the United States Attorney for the Eastern District of Arkansas, heretofore filed on August 23, 1985, and amends his Petition for Removal from State Court as follows:

1. That the district courts of the United States have original jurisdiction in this matter pursuant to 28 U.S.C. 1331.

2. That this is a civil action brought in a state court of which the district courts of the United States have original jurisdiction and is thus removable under 28 U.S.C. 1441(a).

3. That this is a civil action commenced in a state court against an officer of the United States for an act under color of his office and is thus removable under 28 U.S.C. 1442.

WHEREFORE, your Petitioner prays that this action be removed from the Circuit Court of Pulaski County, Arkansas to

the United States District Court for the Eastern District of Arkansas, Western Division.

GEORGE W. PROCTOR
UNITED STATES ATTORNEY

By: /s/Chalk S. Mitchell
Assistant U. S. Attorney
P. O. Box 1229
Little Rock, Arkansas 72203
Telephone: 501/378-5342

VERIFICATION

STATE OF ARKANSAS §
§ ss.
COUNTY OF PULASKI §

I, Chalk S. Mitchell, having been duly sworn on oath state that I am an Assistant United States Attorney for the Eastern District of Arkansas, and that the averments of the foregoing amended petition are true, correct and complete to the best of my knowledge and belief.

GEORGE W. PROCTOR
UNITED STATES ATTORNEY

By: /s/ Chalk S. Mitchell
Assistant U. S. Attorney
P. O. Box 1229
Little Rock, Arkansas 72203
Telephone: 501/378-5342

SUBSCRIBED AND SWORN to before me on this the 3rd day of October, 1985.

/s/ Jackie Johns
NOTARY PUBLIC

My Commission Expires:
4-1-93

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-85-605

UNION NATIONAL BANK OF LITTLE ROCK
PLAINTIFF

v.

MALCOLM BALDRIDGE, Secretary of the
United States Department of Commerce
DEFENDANT

ORDER

Pending before the Court is plaintiff's motion to remand this case to the Circuit Court of Pulaski County, Arkansas. This case involves a suit against the Economic Development Administration (EDA) on two separate loan guaranties which the EDA has refused to honor. The loan guaranties were authorized under the Trade Act of 1974 (codified at 19 U.S.C. § 2341, *et seq.*). Plaintiff bases his motion primarily upon 19 U.S.C. § 2350 which provides in part:

> In providing technical and financial assistance under this Chapter (19 U.S.C. § 2341 et seq.) the Secretary (of Commerce) may sue and be sued in any court of record of a State having general jurisdiction or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy.

Plaintiff contends that this statute precludes remand by defendant from State Court to the United States District Court.

For authority plaintiff relies upon *Ruth v. Westinghouse Credit Co.*, 373 F. Supp. 468 (W.D. Okla. 1974) and *Griffin v. Hooper-Holmes Bureau, Inc.*, 413 F. Supp. 107 (M.D. Fla. 1976), cases in which the courts interpreted the Fair Credit Reporting Act (codified at 15 U.S.C. § 1681 *et seq.*) by analogizing language in the Fair Labor Standards Act (codified at 29 U.S.C. § 219). While it is true that a party whose suit is brought under the Fair Labor Standards Act may not remove to federal court once the State forum has been selected, the instant case is not one brought under the Fair Labor Standards Act. *Ruth* and *Griffin* are therefore not apposite to the issue of removal of this case by defendant, and the concurrent jurisdiction provided by 19 U.S.C. § 2350 would not preclude removal to federal court.

Even more important is the fact that defendant Malcolm Baldridge is an officer of the United States being sued for an act done under color of his office. Pursuant to 28 U.S.C. § 1442 he has an absolute right to removal from State court to federal court.

Title 28 U.S.C. § 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States of any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

This statute is broad enough to cover all cases where Federal officers can raise a colorable defense arising out of their duty to enforce Federal law. *Willingham v. Morgan*, 359 U.S. 402

(1969). Only an express statutory provision included in the federal statute under which plaintiff seeks relief may bar removal pursuant to 28 U.S.C. § 1442(a)(1). *Chandler v. Riverview Leasing, Inc.*, 605 F. Supp. 157 (E.D. Pa. 1984); *Mcconnell v. Marine Eng'rs Beneficial Ass'n Benefit Plans*, 526 F. Supp. 770 (N.D. Cal. 1981); *Haun v. Retail Credit Co.*, 420 F. Supp. 859 (W.D. Pa. 1976). Absent an express statutory provision in 19 U.S.C. § 2341, *et seq.* barring removal, the Court finds that removal of this case from State court to federal court is proper.

Accordingly, the Court denies plaintiff's motion.

IT IS SO ORDERED this 5th day of November, 1985.

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. LR-C-85-605

UNION NATIONAL BANK OF LITTLE ROCK,
PLAINTIFF,

VS.

MALCOLM BALDRIDGE, Secretary of the
United States Department of Commerce,
DEFENDANT.

ANSWER

Comes now Defendant, Malcolm Baldridge, Secretary of the United States Department of Commerce by and through George W. Proctor, United States Attorney, and in answer to Plaintiff's Complaint states as follows:

1. Defendant admits that the United States District Court for the Eastern District of Arkansas, Western Division, has jurisdiction in this proceeding but denies that the Circuit Court of Pulaski County, Arkansas, possesses jurisdiction in this matter.

2. Defendant admits the allegations contained in Paragraph Two of Plaintiff's Complaint.

3. Defendant denies the allegations contained in Paragraph Three of Plaintiff's Complaint.

4. Defendant denies that Plaintiff is entitled to a jury trial as to Count One or Count Two of its Complaint.

5. Defendant admits that on March 19, 1981, Plaintiff and the Economic Development Administration (hereinafter "EDA")

entered into the Guaranty Agreement attached as Exhibit "A" to the Complaint but denies the remaining allegations contained in Paragraph Five of Count One of the Plaintiff's Complaint.

6. Defendant admits that the Promissory Note attached as Exhibit "B" to the Complaint is past due and substantially unpaid but states that it is without knowledge as to whether Plaintiff made demand upon the maker of said note and, therefore, denies same and demands strict proof thereof.

7. Defendant denies the material allegations contained in Paragraph Seven of Count One of Plaintiff's Complaint.

8. Defendant admits that despite demand, Defendant has refused to pay Plaintiff but denies that ninety percent (90%) of the total principal and interest due on the note is equal to the amounts as alleged in the remaining material allegations of Paragraph Eight of Count One of Plaintiff's Complaint.

9. Defendant admits that on March 19, 1981, Plaintiff and EDA entered into the Guaranty Agreement attached as Exhibit "C" to Plaintiff's Complaint but denies the remaining material allegations contained in Paragraph Nine of Count Two of Plaintiff's Complaint.

10. Defendant admits that the note attached as Exhibit "D" to the Complaint is past due and substantially unpaid but Defendant states that it is without knowledge as to whether the Plaintiff made demand upon the maker of said note and, therefore, denies same and demands strict proof thereof.

11. Defendant denies the material allegations contained in Paragraph Eleven of Count Two of Plaintiff's Complaint.

12. Defendant admits that despite demand of Plaintiff, Defendant has refused to pay Plaintiff but denies the ninety percent (90%) of the total principal and interest due upon the note attached as Exhibit "D" is in the amounts alleged in Paragraph

Twelve of Count Two of Plaintiff's Complaint and, therefore, denies sames.

13. Counter Affidavit for Counts One and Two.

STATE OF ARKANSAS *
*
COUNTY OF PULASKI *

Chalk W.[sic] Mitchell, Assistant United States Attorney for Defendant, states under oath, that he verily believes that there are substantial and meritorious defenses as asserted by defendant and that Plaintiff's suit is without merit.

/s/ CHALK S. MITCHELL

Subscribed and sworn to before me, a notary public, duly qualified and acting in and for said County and State on this the 3rd day of October, 1985.

/s/ Jackie Johns
Notary Public

My Commission Expires 1
day of 4, 1993.

WHEREFORE, Defendant moves the Court to dismiss this action for failure to state a claim against Defendant upon which relief may be granted; to strike Plaintiff's demand for attorney fees; to render judgment in favor of Defendant and dismiss this action with costs taxed to Plaintiff.

GEORGE W. PROCTOR
UNITED STATES ATTORNEY

BY: /s/ Chalk S. MITCHELL
ASSISTANT UNITED
STATES ATTORNEY
Attorneys for Defendant,

Malcolm Baldridge,
Secretary for the United
States Department of Commerce
P. O. Box 1229
Little Rock, Arkansas 72203

ECONOMIC DEVELOPMENT ADMINISTRATION
OFFICE OF CHIEF COUNSEL

BY: /s/ EDWIN D. LEDFORD
Room 7106
Main Commerce Building
14th Street and Constitution Avenue
Washington, D.C. 20230
Of Counsel for Defendant

BY: /s/ ROBERT P. REYNOLDS
P. O. Box 2427
Tuscaloosa, Alabama 35403
Of Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served Hon. W. R. Nixon, Jr., P. A. for Smith, Smith, & Duke, 1955 Union National Plaza, Little Rock, Arkansas, 72201, attorney for Plaintiff, in the foregoing matter with a copy of this Answer by depositing a copy of the same in the United States Mail in an envelope with adequate postage prepaid thereon and properly addressed to him.

This the 3rd day of October, 1985.

/s/ Chalk S. Mitchell
Assistant U. S. Attorney

No. 91-590

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNION NATIONAL BANK OF LITTLE ROCK, PETITIONER

v.

ROBERT MOSBACHER, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
MARC RICHMAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 19 U.S.C. 2350 grants the regional district courts subject-matter jurisdiction over actions against the Secretary of Commerce to enforce guaranty agreements executed by the Secretary pursuant to the Trade Act of 1974, 19 U.S.C. 2341 *et seq.*

2. Whether the district court properly concluded that Fed. R. Civ. P. 38(d) barred petitioner from withdrawing its request for a jury without respondent's consent.

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-590

UNION NATIONAL BANK OF LITTLE ROCK, PETITIONER

v.

ROBERT MOSBACHER, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 933 F.2d 1440. The opinions of the district court (Pet. App. A33-A35, on the jurisdictional issue, and App., *infra*, 1a-12a, on the jury trial issue) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1991. A petition for rehearing was denied on July 8, 1991. Pet. App. A19. The petition for a writ of certiorari was filed on October 7, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1981, the Economic Development Administration in the Department of Commerce, acting pursuant to the Trade Act of 1974, 19 U.S.C. 2341 *et seq.*, guaranteed certain loans from petitioner to Leird Church Furniture Manufacturing Company. Pet. App. A5. Because the loans were not repaid in a timely manner, petitioner filed suit against the Secretary in July 1985 to enforce the guaranties in the Circuit Court of Pulaski County, Arkansas. *Id.* at A24-A26. In August 1985, the Secretary removed the case to the United States District Court for the Eastern District of Arkansas, relying initially on 28 U.S.C. 1441(b), but later on 28 U.S.C. 1441(a)[1] and 1442. Pet. App. at A27-A31.

2. In November 1985, the district court held that the Secretary properly had removed the case to federal court. Pet. App. A33-A35. It concluded that removal was appropriate under 28 U.S.C. 1442 (which allows removal of cases brought against federal officers, see *Mesa* v. *California*, 489 U.S. 121 (1989)), and thus found it unnecessary to consider whether Section 1441(a) also justified removal.

3. Although petitioner initially had requested a jury trial, it subsequently moved to withdraw its motion for a jury trial.[2] App., *infra*, 5a-6a. The district court rejected petitioner's motion. First, it concluded

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[1] In relevant part, 28 U.S.C. 1441(a) provides for removal from state court to federal court of any action "of which the district courts of the United States have original jurisdiction."

[2] The motion was made to the federal bankruptcy court, which was responsible for the case after it was consolidated with Leird's bankruptcy case, which was also pending in the Eastern District of Arkansas. See, App., *infra*, 5a-6a.

that government officers such as the Secretary are entitled to a jury trial under common-law principles because the case alleged a breach of contract, an action that would have received a jury trial at common law. Second, and alternatively, it concluded that—even if the Secretary was not entitled to a jury trial—petitioner could not withdraw its demand for a jury trial without the consent of the Secretary. See Fed. R. Civ. P. 38(d) ("A demand for trial by jury * * * may not be withdrawn without the consent of the parites."). App., *infra*, 10a-11a.

4. With respect to the Secretary, the court of appeals affirmed. Pet. App. A1-A18. With respect to petitioner's claims against the Secretary, it stated only that the claims raised in this petition were "without merit." *Id.* at A18.

ARGUMENT

1. Petitioner first claims (Pet. 12-16) that the court of appeals erred in concluding that the district court had removal jurisdiction over this case. Its argument proceeds in two steps, first arguing that there was no federal-officer jurisdiction (which would justify removal under 28 U.S.C. 1442(a)(1)), and second arguing that there was no federal question jurisdiction (which would justify removal under Section 1441(b)). But whatever the merits of those arguments, they are irrelevant to the disposition of this case, because jurisdiction unquestionably was proper under the third statute on which the Secretary relied for removal, Section 1441(a).[3]

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[3] The government definitely relied on Section 1441(a) in the district court. See Pet. App. A30 (Secretary's amended removal petition, relying on Section 141(a)); Pet. App. A33-

Title 28 U.S.C. 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant * * * to the district court of the United States for the district and division embracing the place where such action is pending." 19 U.S.C. 2350 explicitly provides for subject-matter jurisdiction in the regional district courts over cases of this type (emphasis added):

> In providing technical and financial assistance under [the Trade Act of 1974] the Secretary may sue and be sued in any court of record of a State having general jurisdiction or in any United States district court, and *jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy.*

Accordingly, it is clear that the lower courts correctly concluded that removal was proper in this case. Petitioner's jurisdictional argument merits no further review.

2. Petitioner also contends (Pet. 16-20) that the district court erred in declining to allow petitioner to withdraw its demand for a jury trial, arguing that because the case sought a money recovery it should be treated as if it arose under the Tucker Act, 28 U.S.C. 1346 (where jury trials are barred by 28

A34 (opinion of district court discussing Section 1441(a)). To be sure, the government's brief in the court of appeals did not explicitly rely on Section 1441(a), but we believe a fair reading of the brief placed before the court of appeals all of the arguments made in the district court. See Gov't C.A. Br. 20 n.16 (noting that "[t]he Secretary relied on both § 1441 and § 1442 in its petitions for removal" and that "the lower court's ruling may be upheld on any other theory supported by the record").

U.S.C. 2402), even though the complaint stated that the case arose under the Trade Act rather than the Tucker Act. See Pet. App. A24. The main problem with this contention, though, is that it was not raised below,[4] and thus is not properly before this Court. See *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Because petitioner does not address the arguments on the basis of which the district court (and, presumably, the court of appeals) concluded that the Secretary was entitled to a jury trial, the petition merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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DECEMBER 1991

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[4] The only arguments raised below were the arguments rejected by the district court, namely that government officers have no right to a jury trial and that the district court erred in relying on Fed. R. Civ. P. 38 to prevent petitioner from withdrawing its jury trial demand. See Pet. C.A. Br. 48-49; Reply Br. 23-24; Pet. for Reh'g 7. Petitioner cited neither 28 U.S.C. 2402 nor the Tucker Act in this section of its papers in the court of appeals.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR 84-855M
No. LR-M-1279

IN RE: LEIRD CHURCH FURNITURE MANUFACTURING COMPANY, INC., DEBTOR.

AP Nos. 84-540M and 84-558M
No. LR-C-88-55

LEIRD CHURCH FURNITURE MANUFACTURING COMPANY, INC. AND EDWARD L. KUTAIT, PLAINTIFFS

vs.

UNION NATIONAL BANK OF LITTLE ROCK, DEFENDANT

AP No. 86-170M
No. LR-C-85-605

UNION NATIONAL BANK OF LITTLE ROCK, PLAINTIFF

vs.

SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANT

[Filed Apr. 7, 1989]

ORDER

Pending before the Court are the Recommendations of the Honorable James G. Mixon, United States Bankruptcy Judge for the Eastern District of Arkansas, to withdraw reference in AP Nos. 86-170M, 84-540M and 84-558M. A journey through the procedural maze of these cases is necessary for an understanding of the Court's ruling.

On March 23, 1984, Leird Church Furniture Manufacturing Company, Inc. ("Leird") and Edward Kutait ("Kutait") filed suit in Pulaski County Circuit Court against Union National Bank of Little Rock, Arkansas ("Union"). Their complaint arose out of several loan transactions, in particular several promissory notes totalling over $900,000.00 guaranteed by Kutait's brother and three promissory notes Leird executed which were guaranteed by the Economic Development Administration ("EDA") of the United States Department of Commerce. Leird contended that as a condition to making the loans guaranteed by the EDA, Union forced Kutait to relinquish control of Leird and placed its agent, Roger Morin, in the position of President and Chief Executive Officer of Leird.

The Leird Kutait complaint contains seven causes of action. Count I alleges that Union intentionally interferred with plaintiffs' contractual relationships and business expectancies by placing Morin in a position of control. Count II alleges that Union made material misrepresentations concerning Morin's ability to manage the business. Count III alleges that Union negligently entrusted to Morin the operation and control of Leird. Count IV alleges that Union subjected Leird to economic duress and made damaging threats. Count V alleges that Union was neg-

ligent in its selection of Morin and that it should have known of his capabilities and limitations. Count VI alleges that Union violated certain banking practices under 12 U.S.C. § 1971 *et seq.* Count VII alleges breach of fiduciary duty and fair dealing. Plaintiffs seek compensatory damages in the amount of five million dollars, and punitive damages in the amount of ten million dollars. Plaintiffs requested a jury trial.

Union answered and filed a counterclaim for the amount owed on the unpaid loans. In reply to the counterclaim, filed on June 1, 1984, plaintiffs alleged that the loans or debts were invalid, void and unenforceable.

On June 27, 1984, Leird filed a Chapter 11 petition in bankruptcy court.[1] The case was assigned docket no. LR-84-855M. Union filed its proof of claim on October 5, 1984. On November 28, 1984, Leird filed an objection to allowance of Union's claim. As a basis for the objection, Leird stated it was not indebted to Union for the reasons set forth in the state court proceeding filed in March. Leird requested that in the alternative, if the court allowed Union's claim, the claim be reduced by Leird's claim against Union or that it be subordinated under the principle of equitable subordination. Leird's objection was docketed as Adversary Proceeding (AP) 84-540 (hereinafter referred to as the "debt AP").

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[1] Upon motion, the bankruptcy court converted the case to a Chapter 7 proceeding by Order dated April 18, 1985. The bankruptcy court subsequently entered another Order on October 9, 1985, converting the case to a Chapter 7, relieving the trustee and the surety on the trustee's bond, and directing the debtor to file a newly completed Chapter 7 petition.

On December 6, 1984, Union removed the state proceeding of Leird and Kutait to bankruptcy court pursuant to Rule 9027 of the Rules of Bankruptcy Procedure. The removed action was docketed as Adversary Proceeding (AP) 84-558 (hereinafter referred to as the "tort AP"). On June 5, 1985, plaintiffs filed a jury demand.

On June 11, 1985, the bankruptcy court found that since 11 U.S.C. § 1478 which had governed removal had been repealed by the Bankruptcy Amendments and Federal Judgment Act of 1984, Bankruptcy Rule 9027 which had implemented 28 U.S.C. § 1478 was invalid. The bankruptcy court therefore transferred the tort AP to district court.

The transferred case was docketed in district court as LR-M-902. Union requested that the case be remanded to bankruptcy to which plaintiffs had not [*sic*] objection. By Order dated July 2, 1985, the Honorable Henry Woods, U.S. District Judge referred the case to bankruptcy pursuant to 28 U.S.C. § 157(b)(1), (2)(B) and (C).

On June 7, 1985, plaintiffs moved to amend their complaint to add the EDA as a necessary party pursuant to F.R.Civ.P. 19. That motion was subsequently withdrawn after Union filed an action against the Department of Commerce in state court. Union noted that it would request the district court action be transferred to bankruptcy to be consolidated with the tort AP.

Still at issue in the tort AP was plaintiffs' request for a jury trial. On March 19, 1986, the bankruptcy court entered a Memorandum Opinion and Order finding that tort AP was a core proceeding and that plaintiff was entitled to a jury trial on the tort claim. The court directed the trustee to intervene as party

plaintiff and demand a jury trial. The bankruptcy court referred the matter to the district court for a determination of whether the jury trial would be conducted in the district court or the bankruptcy court.

The tort AP was once again transferred to district court under LR-M-902. By Order dated August 13, 1986, Judge Woods referred the case to the bankruptcy court for jury trial pursuant to the provisions of Local Rule 32 III(e).

In the meantime, on July 23, 1985, Union filed a complaint in Pulaski County Circuit Court against the Secretary of the United States Department of Commerce ("Secretary"). Union alleged that the EDA (for which the Secretary is liable) had agreed to pay ninety percent of the total principal and interest due on two promissory notes executed by Leird, and had refused to honor these two separate loan guaranties. Union requested a jury trial. The Secretay removed the action to district court on August 23, 1985. The case was docketed as LR-C-85-605 and was assigned to this Court. Union filed a motion to remand. By Order filed November 5, 1985, the undersigned denied the motion for remand finding that removal was proper under 28 U.S.C. § 1442(a)(1).

Union then moved to refer LR-C-85-605 to bankruptcy court. Union noted that its claims were related to Leird's Chapter 7, particularly the debt AP. The Secretary opposed referral to bankruptcy. The Secretary argued that the cases were not related to the bankruptcy matters, and that even if the suit on the guaranties were related, the bankruptcy court could only make proposed findings of fact and conclusions of law as the Secretary would not consent to referral. After the issue was thoroughly argued by the parties, the undersigned by Order dated Febru-

ary 28, 1986, referred the case to the bankruptcy court. In particular, the Court found that the lawsuit was a "related" matter under 28 U.S.C. § 157.

The suit of Union against the Secretary was docketed in bankruptcy court as Adversary Proceeding (AP) 86-170 (hereinafter referred to as the "guaranty AP").

On September 24, 1987, Union moved to waive its demand for jury trial in the guaranty AP. Union requested that the guaranty AP be heard by the bankruptcy court prior to the jury trials in the debt AP and tort AP. In response to Union's motion, the Secretary demanded a jury trial and moved to combine the three APs for jury trial. The Secretary argued that the three APs arose out of the same facts and should be tried together before the same jury.

Faced with this procedural morass and with conflicting demands, the bankruptcy court held a hearing to try to resolve the issues. The parties were unable to agree to consent to a trial in bankruptcy court. Thus, on December 17, 1987, the bankruptcy court entered its recommendations for withdrawal of reference.

The bankruptcy court found that the proceeding between Leird, Kutait and Union (presumably the debt AP and tort AP) to be a core proceeding. The guaranty AP is a related proceeding. The bankruptcy court determined that separate trials of the core and related matters would be a waste of judicial economy. The bankruptcy court noted, however, that as it could only submit proposed findings of fact and conclusions of law in a related proceeding, it was not practical for the bankruptcy court to preside over a jury trial in the guaranty AP.

The recommendations [*sic*] for withdrawal of reference was docketed as LR-M-1279 and assigned to

this Court. The undersigned held a telephonic conference on January 4, 1988, at which time a preliminary matter arose of which district judge should consider the recommendations. Since the tort AP was assigned as a miscellaneous case to Judge Woods before the assignment of LR-C-85-605 (Union v. Secretary, subsequently the guaranty AP) to this Court, the Clerk initially determined the matter should be transferred to Judge Woods. However, after a telephonic conference between the undersigned, Judge Woods, and the Clerk of the Court, Judge Woods entered an Order assigning LR-M-902 (Union v. Leird, or the tort AP) civil case number LR-C-88-55, and transferring it to this Court.

Thus, the Court presently has before it a number of different files from several courts. Still at issue is whether reference should be withdrawn. The parties, in particular Union and the Secretary, have filed voluminous objections and responses to the bankruptcy court's recommendations. These objections and responses have been filed in LR-C-85-605.

Union objects to the bankruptcy court's recommendations on a number of grounds. It argues that (1) there is no right to a jury trial on the guaranty AP and the debt AP; (2) there is no right to a jury trial in a core proceeding, therefore the Court should reconsider whether the tort AP should be tried to a jury; and (3) the cases should not be consolidated as they involve different factual and legal issues and consolidations would be prejudicial to Union. Presumably, Union's bottom line is that the debt AP and guaranty AP should be consolidated and tried separately from the tort AP.

The Secretary argues that (1) it has a right to a jury trial on the guaranty AP; (2) the tort AP is not a core proceeding and therefore can be tried to a

jury; and (3) the cases should be consolidated because they involve similar factual and legal issues, and consolidation would be in the interest of judicial economy.

Leird and Kutait have voiced their positions in letters to the Court.[2] In a letter dated January 21, 1988 from Gregory M. Hopkins, Esq. to Judge Woods, Mr. Hopkins stated that the cases should be consolidated.

ANALYSIS

In addition to determining whether the debt, tort and guaranty APs should be consolidated, the Court must address a number of issues preliminarily.

1. Is the Tort AP a core proceeding?

The bankruptcy court found that the tort AP and the debt AP were core proceedings. Core proceedings include, but are not limited to those matters listed in 28 U.S.C. § 157(b)(2). In its Memorandum Opinion of March 19, 1986 in AP 84-558M, the bankruptcy court stated that the district court found the case to be a core proceeding under 28 U.S.C. § 157(b)(1), (b)(2)(B), and (b)(2)(C).[3] The bankruptcy court

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[2] The Court notes that the counsel have resorted to letter writing where formal motions or responses should be submitted and filed as part of the record. The Court directs that in the future the parties should make their positions known in the form of a motion or response, to be filed with the Clerk. *See* F.R.Civ.P. 7(b).

[3] Section 157 provides in relevant part:

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

determined that Leird's cause of action was a counterclaim for alleged interference with business relations.

It is in the first instance, the responsibility and the province of the bankruptcy court to determine whether a matter is a core or non-core proceeding. 28 U.S.C. § 157(b)(3) ("The bankruptcy judge shall determine, on the judge's own motion, or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11."); *In re Kaiser Steel Corp.*, 1989 WL 3479 (Bkrtcy. D. Colo. 1989).

"Where a creditor of the estate files a proof of claim and the estate counterclaims against him, or where the estate brings an action against a creditor and the creditor counterclaims asserting a setoff, it is entirely appropriate for the action to be classified as a core proceeding." *Matter of Honeycomb*, 72 B.R. 371, 373 (Bkrtcy. S.D.N.Y. 1987) (citation omitted).

Here, the tort AP arises out of the same transaction as that which gave rise to Union's proof of claim. Furthermore, the parties in the tort AP and the debt AP have consented to the bankruptcy forum in which to litigate their claims. Leird and Kutait filed a petition in bankruptcy; Union filed a proof of claim and

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[3] [Continued]

(2) Core proceeding include, but are not limited to—

* * * *

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under Chapter 11, 12, or 13 or title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

removed the original tort action to bankruptcy. *See In re Kroh Brothers Development Co.*, 91 B.R. 889 (Bkrtcy. W.D. Mo. 1988); *In re Beugen*, 81 B.R. 994 (Bkrtcy. N.D. Cal. 1988). In addition, neither of the parties to the tort AP objected to its characterization as a core proceeding, and therefore they have waived any objection and impliedly consented to the bankruptcy court's jurisdiction. *In re Rath Packing Co.*, 75 B.R. 137, 138 (N.D. Iowa 1987) ("Finally, Rath impliedly consented to the jurisdiction of the bankruptcy court by bring[ing] these claims seeking affirmative relief, by asserting that these claims were all core proceedings, and by failing to timely raise the issue of whether these claims are core proceedings.")

In sum, the Court agrees with the bankruptcy court that the tort AP and the debt AP are core proceedings.[4]

2. Whether the Secretary has a right to a jury trial on the guaranty AP?

As discussed above, Union originally requested a jury trial in its state court action against the Secretary. Union subsequently withdrew its request for a jury trial and now argues that the Secretary does not have a right to a jury trial.

The guaranty AP is a related proceeding; therefore, the unsettled issue of jury trials in core proceedings is not relevant to whether the guaranty AP can be tried to a jury.

The Court agrees with the Secretary that the Secretary has a right to a trial by jury because Union

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[4] The Court questions whether the Secretary has standing to challenge the determination of the tort AP as a core proceeding as the Secretary is not a party to that proceeding. However, as the Court is persuaded that the bankruptcy court's determination is correct, the Court need not resolve the issue of the Secretary's standing.

is suing on a contract, a suit at common law to which the right to a jury attaches. The Court further agrees with the Secretary that Union's demand for a jury trial may not be withdrawn without the consent of the Secretary.

Rule 38(d) of the Federal Rues of Civil Procedure provides that "[a] demand for a trial by jury . . . may not be withdrawn without the consent of the parties." The Rule ensures that one party may rely on another's jury demand. *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1304 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 279 and 104 S.Ct. 280 ("As a practical matter, Rule 38(d) prevents a party from withdrawing its request for a jury trial subsequent to the expiration of the period of a timely demand by the other parties hereby depriving those parties of the right to a trial by jury.") *See also Rosen v. Dick*, 639 F.2d 82 (2d Cir. 1980).

The Court therefore finds that the guaranty AP should be tried before a jury.

3. Should the core and related proceedings be consolidated? [5]

The issue of consolidation is not easily resolved given the 180° change in the position of the Secretary. The Court notes that with reference to Union's motion to remand in LR-C-85-605, the Secretary argued vigorously against removal of the guaranty

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[5] In his Recommendations, the bankruptcy judge stated that the three APs had been consolidated for trial. The records in the cases do not reflect that an order of consolidation was ever entered. The parties, in their objections to the Recommendations, also stress that the bankruptcy court never consolidated the cases. The uncertainty of whether the cases were consolidated in bankruptcy court, however, is of no import to this Court's determination on the question of consolidation.

action because of the different legal and factual issues in the guaranty action and the tort AP. The position is now completely reversed.

The Court is persuaded that a hearing on the issue of whether the cases should be consolidated is necessary. In particular, the parties should address what factual and legal issues are common to the cases; what prejudice any party will suffer as a result of consolidation; the risk of inconsistent adjudications and the possibility of collateral estoppel if the cases are not consolidated. The parties should refrain from raising issues which have already been resolved in this Order.

Accordingly, a hearing on the motion for consolidation is set for May 12, 1989 at 9:30 a.m.

The Court recognizes that a number of motions are pending, including several discovery motions and a motion for judgment on the pleadings. No action will be taken on these motions pending resolution of the issue of consolidation.

IT IS SO ORDERED this 6 day of April, 1989.

/s/ GEORGE HOWARD, JR.
United States District Judge

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No. 91-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

vs.

ROBERT MOSBACHER, SECRETARY OF COMMERCE,
Respondent.

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

vs.

RICHARD SMITH, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT

I.

The Secretary's brief in opposition does not challenge the merits of petitioner's contention that the recognition of federal-officer removal jurisdiction in this case was erroneous and

contrary to the dictates of *Mesa v. California*, 489 U.S. 121 (1989). *See* Pet. Question 1 & Reason 1; Opp. at 3. The brief argues only that petitioner's contention is "irrelevant" and need not be reached. Opp. 3. This is so, the Secretary posits, because 19 U.S.C. § 2350 of the Trade Act of 1974 "clear[ly]" constitutes a direct grant of original subject-matter jurisdiction and therefore removal jurisdiction in this case may now alternatively be sustainable pursuant to 28 U.S.C. § 1441(a). Opp. 3-4.

The conflict with *Mesa* will not be relegated to irrelevance, however, unless this proposition is valid. If it is not, then the Eighth Circuit's erroneous affirmation of removal jurisdiction in violation of *Mesa* squarely presents an issue meriting review. For reasons that follow, the proposition asserted by the Secretary is incorrect. Moreover, if his reading of § 2350 is at a minimum debatable — which it certainly it — then all the more reason exists *to grant* the writ.

The Seventh Circuit interpreted § 2350 in *Citizens Marine National Bank v. U. S. Department of Commerce*, 854 F.2d 223 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). Judge Posner read the section as a statutory waiver of sovereign immunity that also served, in Trade Act cases, to eliminate the $10,000 jurisdictional ceiling contained in the *Tucker Act*'s grant of subject-matter jurisdiction to the district courts. *See id.* at 225; *see also* 28 U.S.C. § 1346(a)(2) (Tucker Act). Under this analysis, subject-matter jurisdiction fundamentally derives from the Tucker Act, not from the Trade Act. Section 2350 only removes the Tucker Act's $10,000 jurisdictional lid, and otherwise preserves intact the scheme of the Tucker Act. *See* Pet. 16-20. The operative language of § 2350 — "jurisdiction is conferred . . . *without regard to the amount in controversy*" (emphasis added) — thus makes perfectly good sense without construing it as an independent grant of subject-matter jurisdiction in the district courts.[1]

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[1] Notably, § 2350 does not say that jurisdiction is "hereby" conferred. This

(Footnote 1 continued on next page)

Furthermore, if, as the Secretary urges, § 2350 should be viewed as an independent source of jurisdiction, then the phrase "without regard to the amount in controversy" becomes superfluous and devoid of content. This is so because a statutory grant of subject-matter jurisdiction is automatically unconstrained by any jurisdictional amount limitation if none is mentioned; no such limitation will exist unless the statute expressly imposes one. *Compare* 28 U.S.C. § 1331 (which is silent regarding the amount in controversy for "arising under" jurisdiction) *with* 28 U.S.C. § 1332 (expressly requiring $50,000 minimum amount in controversy for diversity jurisdiction). Thus, if § 2350 were itself a grant of original jurisdiction, Congress would have had no need to include the words "without regard to the amount in controversy." Like any statute, § 2350 should be construed in such a way as will give meaning and effect to all of its provisions. The Secretary's urged reading would render these words superfluous, whereas the Seventh Circuit's view — that § 2350 merely removes the ceiling in the *Tucker Act*'s jurisdictional grant — gives them content and effect.

The Secretary's brief lists the issue whether § 2350 of the Trade Act grants the district courts subject-matter jurisdiction as a question presented by this Petition. Opp. Question 1. Assum-

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(Footnote 1 Continued)

is consistent with the view that it is some other statute (namely, the Tucker Act), not § 2350, that is doing the conferring of jurisdiction. It is also consistent with Judge Posner's view of § 2350 as a waiver of sovereign immunity. One effect of the sovereign immunity doctrine is that it precludes the court's exercise of jurisdiction. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) (waiver of sovereign immunity is a "prerequisite for jurisdiction"). In this context, § 2350's phrase "jurisdiction is conferred" is properly read merely to waive and undo sovereign immunity's jurisdictional bar that would otherwise exist. For these additional reasons the language of § 2350 relied upon by the Secretary has full meaning and effect without the need to elevate it to an independent grant of subject-matter jurisdiction.

ing for the sake of argument the question is properly presented,[2] this adds to, and does not detract from, the reasons for granting the writ. As explained in the Petition, the recognition of non-Tucker Act bases of jurisdiction in contract actions against the Government has significant ramifications, namely, erosion of the Tucker Act scheme by circumvention of the conditions attached to the Government's waiver of sovereign immunity. The issue whether § 2350 of the Trade Act (and its identically worded counterpart in the Small Business Act, 15 U.S.C. § 634) should be recognized as an independent grant of subject-matter jurisdiction in derogation of the Tucker Act scheme, is itself an important unresolved question worthy of the Court's review. *See generally* Pet. Reason 2; *see also* Pet. 18 n.13 (anticipating this potential issue). The potential presence of this issue underscores the appropriateness of this Petition as a vehicle for the Court to clarify and reinstate the viability of the Tucker Act scheme.

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[2] The Secretary's removal papers did not cite § 2350 as a grant of original subject-matter jurisdiction. Nor did they assert that removal was proper under 28 U.S.C. § 1441(a) by virtue of § 2350. *See* Pet. 6. Such a failure to invoke jurisdictional grounds with specificity has been held to be jurisdictionally fatal in the removal context. *See* authorities cited at Pet. 14. A serious question therefore exists as to whether the Secretary may assert at this late date a previously unarticulated ground for removal jurisdiction and whether, consequently, his asserted ground for denying certiorari has been properly preserved. (This is the second prong of the Secretary's contention that must true in order for the *Mesa* conflict to become "irrelevant.") Regardless whether the Secretary's § 2350 argument has been preserved, however, his basis for opposing certiorari is obviated: if his § 2350 argument has *not* been preserved, then the *Mesa* conflict is squarely presented and there is no obstacle to reaching it; if, on the other hand, the argument *is* properly presented, this merely adds to the certworthy questions presented on this Petition, as more fully discussed in the text, *infra*.

II.

The Secretary's argument that the jury trial issue (Pet. Question 2 & Reason 2) is not well presented because it could be resolved on F. R. Civ. P. Rule 38(d) waiver grounds, lacks merit and, in fact, begs the question. If, as petitioner contends, the Tucker Act — as the sole proper predicate for removal jurisdiction — would have barred a jury trial in the district court, *see* 28 U.S.C. § 2402, then the district court was without authority to conduct a jury trial. A jury trial was prohibited even if both the Secretary and petitioner had *consented* to a jury trial, as Rule 39(c) makes clear.[3] If a right to trial by jury cannot be conferred by both parties' consent in such a case, then *a fortiori* it cannot be conferred by one party's failure to consent to withdrawal of the other party's (ineffectual) jury demand.[4]

Petitioner's objection to the jury trial was made and preserved in both courts below (*see* Main Br. at 2 & Point III, B; Reply Br. Point IV, B),[5] was considered and rejected by the Court of Appeals (A-18), and is properly reviewable by this Court.

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[3] *"[E]xcept in actions against the United States when a statute of the United States provides for trial without a jury,* the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." F. R. Civ. P. 39(c) (emphasis added).

[4] The Secretary's Rule 38 argument stems from the fact that petitioner made a jury demand in its state court complaint, which became the operative pleading in federal court after the Secretary removed the case. Petitioner's jury demand was thus made in and meant for the *state* court. It was ineffective in *federal* court by virtue of 28 U.S.C. §§ 1346(a)(2) and 2402. Furthermore, the crucial inquiry under Rule 38(d) is whether one party detrimentally relied upon the other party's jury demand by failing to make a demand of its own. Here, there could be no such reliance because the Secretary's Answer filed in the district court explicitly *denied* that the case was triable to a jury (A-36).

[5] Petitioner also specifically urged below that the sole proper basis for removal jurisdiction would have been the Tucker Act, which the Secretary had failed to assert in his removal papers. Reply Br. at 22-23.

CONCLUSION

The Secretary's urged grounds for denying the writ lack merit. The questions raised by this Petition are properly presented and, for the reasons given in the Petition and above, warrant review. The writ should be granted.

Respectfully submitted,

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